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No. _____

IN THE

Supreme Court of the United States

October Term, 2000

WALTER S. STEVENSON,
United States Navy (Retired),
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Armed Forces

PETITION FOR WRIT OF CERTIORARI

M. ERIC EVERSOLE
Lieutenant, JAGC
U.S. Naval Reserve

OMAR R. LOPEZ
Lieutenant, JAGC
U.S. Naval Reserve

CURT M. ALLEN*
Captain
U.S. Marine Corps
* *Counsel of Record*

U.S. Navy-Marine Corps
Appellate Defense Division
716 Sicard Street, S.E., Suite 1000
Washington Navy Yard, D.C. 20374
(202) 433-4161

Counsel for Petitioner

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56 pp

QUESTION PRESENTED

Whether the military can suspend a retired servicemember's Fourth Amendment rights by conducting non-probable cause searches and seizures of his blood for DNA analysis based solely on the existence of personal jurisdiction?

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PETITION FOR WRIT OF CERTIORARI

Walter S. Stevenson, United States Navy (retired), petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces, *United States v. Stevenson*, 53 M.J. 257 (2000), is located in Appendix A at 1a-9a. The opinion of the Navy-Marine Corps Court of Criminal Appeals, *United States v. Stevenson*, 52 M.J. 504 (N.M. Ct. Crim. App. 1999), is located in Appendix B at 10a-22a. The unpublished order of the trial judge is located in Appendix C at 23a-33a.

JURISDICTION

The lower court entered its judgment on August 2, 2000. Petitioner filed a timely petition for reconsideration, which was denied on August 31, 2000. App. D. at 34a. This Court's jurisdiction is invoked under 28 U.S.C. § 1259(2).

CONSTITUTIONAL PROVISION AND MILITARY RULE OF EVIDENCE INVOLVED

The Fourth Amendment to the United States Constitution provides, in relevant part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . .

Military Rule of Evidence 312(f) provides:

> Nothing in this rule shall be deemed to interfere with the lawful authority of the armed forces to take whatever action may be necessary to preserve the health of a servicemember. Evidence or contraband obtained from an examination or intrusion conducted for a valid medical purpose may be seized and is not evidence obtained from an unlawful search or seizure within the meaning of Mil. R. Evid. 311.

STATEMENT OF THE CASE

I. Facts

Naval Criminal Investigative Service [NCIS] targeted Petitioner as a possible suspect in November 1997 for the 1992 rape of a military dependent in Hawaii. The agency's suspicion rested on a Pearl Harbor police report that listed him as a possible "peeping Tom" suspect. This incident occurred five months prior to the rape and in an area near

the victim's house. NCIS also knew that Petitioner was an active duty Sailor stationed in Hawaii in 1992. He had since been placed on the temporary disabled retired list [TDRL][1] in 1994 for schizophrenia. He lived in Tennessee.

Agents from the NCIS office in Hawaii contacted Special Agent John McNutt in Memphis, Tennessee. They asked him to interrogate Petitioner and request a sample of his blood for deoxyribonucleic acid [DNA] testing. Special Agent McNutt began by reviewing Petitioner's medical records. These records indicated that he suffered from schizophrenia and diabetes. The diabetes required him to have weekly screenings for blood-sugar levels at the Veterans Administration [VA] hospital in Memphis, Tennessee. Special Agent McNutt relayed this information to NCIS headquarters.

After reviewing the information, NCIS headquarters advised Special Agent McNutt not to have direct contact with Petitioner because of his psychosis. Instead, the agency wanted him to verify Petitioner's blood type. When this information did not eliminate him as a suspect, Special Agent McNutt called the VA Regional Counsel, Ron Dooley, to discuss the possibility of obtaining a blood sample for DNA testing of a possible rape suspect. Mr.

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[1] Members of the TDRL are servicemembers with disabilities "not yet determined to be stabilized or permanent." App. 4a. They receive retirement pay and medical benefits. *Id.* In return, members must maintain a current address with the Retired Pay Department of an appropriate Finance Center, and they must undergo physical examinations every eighteen months to ensure continued disability. App. 20a. A failure to report to the physical, however, does not result in punitive action. App. 20a-21a The Navy may suspend retirement pay, and if noncompliance continues, it may administratively separate the member from the naval service. App. 21a. Finally, if the disability subsides within five years, the TDRL member may reenlist if otherwise qualified. App. 4a, 21a. He cannot be forced into active duty service. App. 6a, 21a.

Dooley replied that the hospital often gave blood samples to law enforcement for driving under the influence cases. Special Agent McNutt simply needed to request the blood in a memorandum. He filed this request on May 21, 1998.

On June 3, 1998, Petitioner went to the VA hospital in Memphis for his weekly diabetes test. The sole purpose of this visit was to monitor his blood-sugar levels. Hospital staff, acting in part on NCIS's request, extracted two vials of blood. One vial was for Petitioner's diabetes screening and the second was for DNA testing by NCIS. At no time was Petitioner informed of, nor did he consent to, the use of his blood for DNA analysis. The government also conceded that NCIS did not have probable cause or seek a search warrant. App. 26a.

Special Agent Gail Beasely received the second vial of blood that afternoon. She sent it to the United States Criminal Investigation Laboratory for DNA matching. Petitioner's sample allegedly matched the DNA from the victim's rape kit.

II. Proceedings Below

The United States Navy charged Petitioner with one specification of rape in violation of Article 120, Uniform Code of Military Justice [UCMJ], 10 U.S.C. § 920. Petitioner subsequently filed a motion to suppress blood and DNA evidence on March 18, 1999. The motion challenged the legality of the search and seizure of his blood under the Fourth and Fifth Amendments.

The trial judge agreed with Petitioner and suppressed the blood and DNA evidence. The judge noted, and the government conceded, that there was no probable cause or a search warrant. App. 26a. The only basis offered by the government for admissibility was Military Rule of Evidence [Mil. R. Evid.] 312(f). App. 28a. The judge rejected that argument. He concluded that the application of Mil. R.

Evid. 312(f) would violate the Fourth and Fifth Amendments. App. 32a-33a. He opined that the rule "should be narrowly construed to apply only to members of the 'active duty' armed forces." App. 30. Moreover, he stated that the search and seizure of DNA was an attempt by the government to bootstrap inadmissible evidence "onto a valid medical procedure in an attempt to make lawful that which would not otherwise standing alone be lawful." App. 31a.

The government appealed the court-martial judge's decision to the Navy-Marine Corps Court of Criminal Appeals. *See* Art. 62(a)(1)(B) and (a)(2), UCMJ, 10 U.S.C. § 862(a)(1)(B) and (a)(2). That court affirmed the trial judge's decision on October 18, 1999. Although the court did not find a Fifth Amendment violation, it did find a Fourth Amendment violation in the application of Mil. R. Evid. 312(f) to Petitioner. See App. 21a. Like the proceedings below, this rule was the only offered basis for admitting the evidence. App. 18a. The court also concluded that there was no probable cause or a search warrant in the case. App. 14a.

In applying Mil. R. Evid. 312(f), the court noted that members of the TDRL are retirees with medical disabilities. App. 20a. The armed forces do not rely upon these members to fulfill its mission, and thus, it does not have the same need to preserve their health for mission readiness. App. 21a. Under these circumstances, "there [was] no showing that the application of Mil. R. Evid. 312(f) to members of the TDRL [was] a needed exception to the Fourth Amendment protections applicable to the general populace based upon military exigencies." *Id.*

The Judge Advocate General of the Navy, acting pursuant to Art. 67(a)(2), UCMJ, 10 U.S.C. § 867(a)(2), certified this case to the United States Court of Appeals for the Armed Forces on December 28, 1999. The certification

asked two questions: (1) whether Mil. R. Evid. 312(f) was applicable to members of the TDRL; and (2) whether the sample taken in this case was admissible under the rule. App. 2a.

The court reversed the decisions of the Navy-Marine Corps Court of Criminal Appeals and the military judge on August 2, 2000. In addressing the first issue, the court rejected the contention that the military lacked special needs to apply Mil. R. Evid. 312(f) to retired military personnel. App. 6a-7a. It stated that the existence of court-martial jurisdiction alone was sufficient for the rule's application. App. 6a-7a. As for issue two, the court held that once the blood was withdrawn pursuant to Mil. R. Evid. 312(f), any evidence gained from the initial intrusion was admissible. App. 8a. The only question was whether the prolonged insertion of the needle was of a "*de minimus*" nature under the Fourth Amendment. *Id.* The court remanded the case to the trial judge for this determination. App. 9a.

REASONS FOR GRANTING THE PETITION

The lower court's decision in this case gutted any reasonable expectation of privacy that retired military members had in their person. The court said that Mil. R. Evid. 312(f), which purports to allow non-probable cause searches and seizures of body fluid for valid medical purposes, applied without regard to the member's retired status or the non-healthcare related nature of a subsequent search. The application of Mil. R. Evid. 312(f) only required personal jurisdiction and an initial medical purpose for inserting the needle. This holding ignores Petitioner's Fourth Amendment right to be secure in his person against unreasonable searches and seizures.

I. Retired Members of the Armed Forces Do Not Forfeit Their Fourth Amendment Rights by Becoming Disabled During Their Period of Service and Receiving Pay and Medical Benefits.

It is well-established that Congress and the President are entitled to deference in their rulemaking decisions regarding the military. *See Parker v. Levy*, 417 U.S. 733, 756 (1974). This deference, however, does not permit a blind application of the President's rules. *See Burns v. Wilson*, 346 U.S. 137, 142 (1953) (military courts must examine a military member's constitutional claims). In the context of the Fourth Amendment, courts must examine the intrusion in light of military special needs or the "exigencies of military necessity and unique conditions that may exist within the military society." *Murray v. Haldeman*, 16 M.J. 74, 81 (C.M.A. 1983) (quotations and internal quotation marks omitted); *Committee for GI Rights v. Callaway*, 518 F.2d 466 (D.C. Cir. 1975) (applying a Fourth Amendment "special needs" test to the military's compulsory urinalysis program); *see also National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 671-72 (1989) (in dicta, this Court said that some suspicionless intrusions

of military members are reasonable in light of military special needs).

The lower court chose not to analyze Petitioner's case under a Fourth Amendment framework. It held that the mere existence of court-martial jurisdiction allowed the application of Mil. R. Evid. 312(f). App. 7a. This decision not only ignores Petitioner's Fourth Amendment rights, it misconstrues obvious differences between jurisprudence regarding court-martial jurisdiction and that regarding Fourth Amendment violations.

Court-martial jurisdiction is based on the unilateral interests of the military to prosecute its servicemembers. It is a question "of *status*, namely, whether the accused in the court-martial proceeding is a person who can be regarded as falling within the term 'land and navy Forces.' " *Solorio v. United States*, 483 U.S. 435, 439 (1987) (quoting *Kinsella v. Singleton*, 361 U.S. 234, 240-41 (1960) (emphasis in original)); *Toth v. Quarles*, 350 U.S. 11, 16-17 (1955) (court-martial jurisdiction does not reach veterans without present contacts with the military). Such minimum contacts as a veteran's receipt of pay and medical benefits are sufficient to establish *in personam* jurisdiction. *See United States v. Bowie*, 14 U.S.C.M.A. 631, 34 C.M.R. 411 (1964) (members of the TDRL are subject to jurisdiction because they receive pay and medical benefits).

The existence of these minimum contacts, however, does not make an intrusion constitutional *per se*. Fourth Amendment analysis, unlike the military's interest in retaining jurisdiction, requires courts to weigh the interests of both parties. They must conduct "a context-specific inquiry, examining closely the competing private and public interests advanced by the parties." *Chandler v. Miller*, 520 U.S. 305, 314 (1997) (citations omitted). A person's "status" in the military admittedly plays an important role in this regard, but it is not outcome

determinative. On the contrary, in cases such as this one, the person's status as a retiree lessens the military's need to conduct non-probable cause searches and seizures because of the non-existent role such members have in the military's mission.

The Court of Appeals for the Armed Forces ignored these distinctions when it concluded that court-martial jurisdiction alone permitted the intrusion in this case. This reliance represents a blind application of the President's rules—that is, if the President has the power to court-martial a person, then Military Rule of Evidence 312(f) applies irrespective of that person's constitutional rights. Such a conclusion leads to absurd results in this case, as well as other cases wherein the Fourth Amendment rights of a retiree are in question. The court's rationale would allow the military's use of drug-detection dogs in retirees' homes, *see United States v. Middleton*, 10 M.J. 123, 126-32 (C.M.A. 1981), or it would subject them to compulsory urinalysis. *See United States v. Bickel*, 30 M.J. 277, 280-86 (C.M.A. 1990). This result is not reasonable under any constitutional interpretation of the word, and it requires this Court to grant certiorari to ensure that millions of military retirees are protected from unreasonable searches and seizures by the military.

II. The Military Does Not Have a Legitimate Interest that Is Sufficiently Vital to Conduct a Non-Probable Cause Search and Seizure of Petitioner's Blood for DNA Analysis.

This Court has repeatedly held that Fourth Amendment privacy interests exist at several levels. *See Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 616 (1989). The first level of search occurs when the needle penetrates the skin. *Id.* The second involves "[t]he ensuing chemical analysis of the sample to obtain physiological data." *Id.* (citing *Arizona v. Hicks*, 480 U.S. 321, 324-25 (1987)). As

with any search, a reasonable secondary search generally requires a search warrant issued on probable cause. *See Hicks*, 480 U.S. at 324-25.

This is not to say that all non-probable cause searches and seizures are unreasonable *per se*. *See Skinner*, 489 U.S. at 624. In extraordinary circumstances, such intrusions may be permissible when the government demonstrates "special needs, beyond the normal need for law enforcement." *Chandler*, 520 U.S. at 313-14 (quoting *Skinner*, 489 U.S. at 619) (internal quotation marks omitted). The need must be substantial "enough to override the individual's acknowledged privacy interest, sufficiently vital to suppress the Fourth Amendment's normal requirement of individualized suspicion." *Id.* at 318. Courts must balance "the individual's privacy expectations against the Government's interest to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context." *Von Raab*, 489 U.S. at 665-66 (citation omitted). In the context of criminal cases, courts generally side with an individual's privacy interests and require warrants based on probable cause. *Vernonia School Dist. v. Acton*, 515 U.S. 646, 653 (1995) (citation omitted); *Skinner*, 489 U.S. at 619 (citations omitted).

A. The military lacks a vital interest to conduct a non-probable cause seizure of a retired member's blood under Mil. R. Evid. 312(f).

In reversing the suppression motion, the court below held that the existence of jurisdiction over members of the TDRL showed a continued military status and an interest in the member's "fitness for duty." App. 6a. This interest in fitness for duty, in turn, permitted the constitutional use of the "valid medical purpose" exception embodied in Mil. R. Evid. 312(f). App. 7. Contrary to the court's assertion, this purported interest "is 'symbolic,' not 'special,' as that

term draws meaning from [this Court's] case law." *Chandler*, 520 U.S. at 322.

A military member's "fitness for duty", or his health under Mil. R. Evid. 312(f), is not the primary concern of the military. These concerns are "merely incidental" to the military's primary mission of fighting or being "ready to fight wars should the occasion arise." *Toth*, 350 U.S. at 17 (disciplining personnel is merely incidental to the military's primary mission). It is this relationship between the military's primary mission—*i.e.*, fighting wars—and the means necessary to achieve that mission—*i.e.*, a member's fitness for duty—that establishes whether the alleged special need is sufficiently vital to overcome a person's acknowledge privacy interest. *See Skinner*, 489 U.S. at 627-28 (railroad's primary goal of safety is furthered by the fitness of employees who work in safety-sensitive jobs); *Von Raab*, 489 U.S. at 669-70, 678 (treasury employees' relationship with drug interdiction, weapons, or classified information allows for drug testing); *Bickel*, 30 M.J. at 282-83 (broad rules allowing drug testing of active duty personnel are permissible because a member in a "routine job may be called on short notice to perform a more typically 'military' task."). Thus, the question in this case is whether a physically fit Petitioner, as a member of the TDRL, affects the military's primary mission of national defense.

Here, Petitioner's health or "fitness for duty" does not affect the military's mission. Petitioner, as a member of the TDRL, is a retiree who has a "may be" permanent medical condition preventing him from continued military service. App. 7a, 21a. Unlike active duty members, whose physical and mental health must be maintained for military readiness, he cannot "be called on short notice." *See Bickel*, 30 M.J. at 282-83. In fact, Petitioner cannot be forcibly recalled to active duty service, save a national emergency. App. 7a, 21a. It strains logic to assert, as did the lower

court, that the military relies upon a person who cannot be forced into service outside a declaration of war. *See* App. 7a (citing *Akol v. United States*, 167 Ct. Cl. 99 (1964) (discussing the recall of a disabled retiree due to manpower shortages six months after the bombing of Pearl Harbor)). Such speculative possible service does not show a vital interest.

The military's non-reliance on members of the TDRL is further evident by Congress's secondary concern for their health. Section 1074(a) of Title 10 states that active duty members cannot be denied hospital care at military hospitals. Retired members, on the other hand, are treated "subject to the availability of space and facilities and the capabilities of the medical and dental staff."[2] 10 U.S.C. § 1074(b). This contingent status demonstrates that an active duty member's health takes priority over a retiree's health. The distinction is logical—a healthy active duty member is necessary to fulfill the military's mission on short notice, and thus deserves priority in medical case. A retiree, on the other hand, is not expected to fulfill any immediate need of the military. His or her health can wait.

Ultimately, Petitioner's non-amenability to recall and his status as a second class healthcare recipient do not demonstrate a person relied upon by the military to fulfill its mission. Without this connection, the military's

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[2] Although now obsolete because of the military's implementation of TRICARE, see 10 U.S.C. § 1086, naval health care policies further demonstrate that the military's non-reliance on TDRL members in fulfilling its mission. Naval Medical Command Instruction [NAVMEDCOMINST] 6320.3b, ¶ A-3b, lists retirees, including members of the TDRL, as a fourth-tier priority. If a military hospital has limited space, retirees receive medical treatment after active duty members, members of the Senior Reserve Officers' Training Corps and civilian dependents of active duty members. Only civilian employees of the federal government and "all others" entitled to military medical care are lower on the list. *Id.*

concern for his health is merely "symbolic" because it does not serve its primary mission. *See Chandler*, 520 U.S. at 322. As such, the government cannot claim that it has a sufficiently vital interest under Mil. R. Evid. 312(f) to allow NCIS to seize Petitioner's blood.

B. Even if this Court finds a vital military healthcare need to seize Petitioner's blood, that need does not extend to a search for DNA evidence and it does not outweigh his substantial right to privacy.

Even if Military Rule of Evidence 312(f) creates a special need for preserving a retired servicemember's health, testing for DNA is unrelated to any plausible health care objectives of the military. *See Hicks*, 480 U.S. at 324-25. DNA data is not necessary to preserve health, and it does not disclose any information of immediate benefit to doctors. In fact, the only military organization authorized to collect and store DNA information is the Armed Forces Institute of Pathology [AFIP]. Department of Defense Directive 5154.24 at ¶ 5 (28 Dec 1996). In cases of criminal prosecution, AFIP can release information from its DNA databases only if "the responsible DoD official has received a proper judicial order or authorization." *Id.* at ¶ 5a(4)(a). The lower court decision makes these regulations meaningless. According to the court, once the blood is obtained Mil. R. Evid. 312(f) does not prohibit a subsequent search for DNA. App. 8a.

Moreover, the government suffers no loss, beyond that of criminal investigation, to justify their intrusion into Petitioner's privacy. *Cf. Skinner*, 489 U.S. at 628-32 (Federal Railroad Administration needed drug testing program, in part, to act as a deterrent, protect public safety, and avoid deterioration of evidence). DNA evidence is not evanescent, and waiting for a search warrant will not impede or prevent further investigations. Under these

circumstances, the military cannot demonstrate a compelling interest to search and seize Petitioner's blood for DNA analysis.

On the other hand, it is incontrovertible that Petitioner has a significant privacy interest in his blood and the information contained therein. This Court has said on numerous occasions that blood "can reveal a host of private medical facts about an employee, including whether he or she is epileptic, pregnant, or diabetic." *Skinner*, 489 U.S. at 617; *see also Acton*, 515 U.S. at 658 (noting under Fourth Amendment analysis that "it is significant that the tests at issue here look only for drugs, and not for whether the student is, for example, epileptic, pregnant, or diabetic"). It also "reveal[s] a range of genetic identity features as well as the presence of chemicals within one's system." *United States v. Nicolosi*, 885 F. Supp. 50, 55 (E.D.N.Y. 1995) (collection of saliva without a warrant violates the Fourth Amendment). As the Ninth Circuit emphasized, "few subject areas [are] more personal and more likely to implicate privacy interests than that of one's health or genetic make-up." *Norman-Bloodsaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260, 1268 (9th Cir. 1998) (citing *Doe v. City of New York*, 15 F.3d 265, 267 (2d Cir. 1994)).

On balance, the military cannot demonstrate a vital interest that overcomes Petitioner's substantial privacy interests. NCIS's collection of Petitioner's blood and the subsequent search for DNA is an attempt to conduct criminal investigations in disregard of his substantial privacy rights. This intrusion cannot be tolerated. As Justice Brandeis said, in *Olmstead v. United States*, 277 U.S. 438 (1928):

> It is . . . immaterial that the intrusion was in aid of law enforcement. Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born

> to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.

Olmstead, 277 U.S. at 479.

NCIS's conduct, although made in an attempt to solve crimes, infringes on privacy rights fundamental to the United States and the armed forces, the very organization that protects these rights. Because such conduct is intolerable in a free society, this Court should grant certiorari to ensure that military retirees, such as Petitioner, are not subjected to unreasonable searches and seizures.

CONCLUSION

As demonstrated *supra*, the decision by the Court of Appeals for the Armed Forces' abrogated any reasonable expectation of privacy that retired servicemembers had in their body fluids. The court concluded that the mere existence of personal jurisdiction allowed the military to search and seize a retiree's blood for the sole purpose of prosecution, so long as the initial needle penetration was done for valid medical purposes. Thereafter, once the blood was obtained, military officials could conduct any search or chemical analysis of that blood. These radical departures from the "special needs" doctrine is entirely inconsistent with the Court's Fourth Amendment jurisprudence and, if allowed to stand, effectively eviscerates all retired military members' right to privacy. For this reason alone, this Court should grant this writ of certiorari to ensure that other retirees' are not subjected to Fourth Amendment violations.

Moreover, this Court's failure to grant review now will prevent Petitioner from later redress of these Fourth Amendment violations. Under Section 1259 of Title 28, this court's jurisdiction to review decisions by the Court of rAppeals for the Armed Forces is limited to cases reviewed by that court under Section 867(a) of Title 10. *See* S. Rep. No. 53, 98th Cong., 1st Sess. 11 (1983). In non-capital cases, the court reviews cases at its discretion, *see* 10 U.S.C. § 867(a)(3), or pursuant to a request by a Judge Advocate General. *See* 10 U.S.C. § 867(a)(2). Here, the court reviewed this case pursuant to a request by the Judge Advocate General of the Navy. It issued a final decision with regards to Petitioner's Fourth Amendment claims. Thus, if convicted, Petitioner's only chance of having this issue reviewed is if the Court of Appeals for the Armed Forces grants discretionary review to re-review his claims. Such a possibility is remote at best, and thus, serves as a basis for this Court granting his petitioner for writ of certiorari. *See*

California v. Stewart (decided with *Miranda v. Arizona*, 384 U.S. 436, 498 n.71 (1966) (a decision by the state's highest court is final if it prevents a party from later review of the issue.).

Petitioner respectfully requests this Court grant his petitioner for writ of certiorari.

Respectfully submitted,

M. ERIC EVERSOLE
Lieutenant, JAGC
U.S. Naval Reserve

OMAR R. LOPEZ
Lieutenant, JAGC
U.S. Naval Reserve

CURT M. ALLEN*
Captain
U.S. Marine Corps
**Counsel of Record*

U.S. Navy-Marine Corps
Appellate Review Activity
716 Sicard Street, S.E., Suite 1000
Washington Navy Yard, DC 20374
(202) 433-4161

Counsel for Petitioner

November 2000

Appendix A

UNITED STATES, *Appellant*,

v.

Walter S. STEVENSON, Hospital Corpsman Third Class, U.S. Navy, *Appellee*.

No. 00-6001

Crim. App. No. 99-0769

United States Court of Appeals for the Armed Forces

Argued May 2, 2000
Decided August 2, 2000

EFFRON, J., delivered the opinion of the Court, in which CRAWFORD, C.J., SULLIVAN and GIERKE, JJ., and COX, S.J., joined.

Counsel

For Appellant: *Lieutenant Timothy E. Curley*, JAGC, USNR (argued); *Colonel Kevin M. Sandkuhler*, USMC, and *Commander Eugene E. Irvin*, JAGC, USN (on brief).

For Appellee: *Lieutenant M. Eric Eversole*, JAGC, USNR (argued); *Lieutenant Omar R. Lopez*, JAGC, USNR (on brief).

Military Judge: Raymond J. Kreichelt

Judge EFFRON delivered the opinion of the Court.

Following arraignment at a general court-martial on a charge of rape, see Art. 120, Uniform Code of Military Justice, 10 USC § 920, appellee moved to suppress DNA evidence obtained from a vial of his blood. The military judge granted the motion, the Government appealed under Article 62(a)(1)(B) and (a)(2), UCMJ, 10 USC § 862(a)(1)(B) and (a)(2), and the Court of Criminal Appeals affirmed the ruling of the

military judge. 52 M.J. 504 (1999). Thereafter, the Judge Advocate General certified the case to this Court, see Art. 67(a)(2), UCMJ, 10 USC § 867(a)(2), asking us to address the following issues:

> I. WHETHER MILITARY RULE OF EVIDENCE 312(f) IS APPLICABLE TO MEMBERS OF THE TEMPORARY DISABILITY RETIRED LIST.
>
> II. IF MILITARY RULE OF EVIDENCE 312(f) APPLIES TO APPELLEE, WHETHER THE SAMPLE OF HIS BLOOD SEIZED DURING A MEDICAL PROCEDURE IS ADMISSIBLE UNDER MIL.R.EVID. 312(f).

For the reasons set forth below, we answer the first question in the affirmative. We return this case for consideration of the issues raised by the second question, in light of our opinion, during further court-martial proceedings.

I. BACKGROUND

In November 1997, Naval Criminal Investigative Service (NCIS) investigators determined that appellee was a possible suspect in a November 1992 rape of a military dependent in Hawaii, where appellee had been stationed. At that time, appellee was assigned to the temporary disability retired list (TDRL), see Part II, infra, and was being treated for diabetes at the Veterans Administration (VA) hospital in Memphis, Tennessee.

During the investigation, the NCIS sought to obtain a sample of appellee's blood for purposes of making a DNA comparison between his blood and the samples of blood and semen gathered at the time of the crime. The NCIS asked the VA hospital to obtain a blood sample from appellee the next time he presented himself for a physical examination in which a blood sample would be taken during the normal course of his treatment.

According to the stipulation of fact agreed to by both parties at trial:

> On 3 June 1998, blood was drawn from Stevenson by staff of the VA Hospital in Memphis, TN. This was accomplished by inserting one vacuum needle (with an open end) into Stevenson's arm. While this needle was in his arm, one tube of blood was drawn for treatment and diagnosis of his diabetes. Within five or six seconds after the first tube was withdrawn from the needle, hospital staff inserted a second tube in order to obtain a separate blood sample for NCIS. When the second tube was filled and withdrawn, hospital staff withdrew the needle out of Stevenson's arm. The needle was in Stevenson's arm during the entire time both tubes were filled.

The findings of fact by the military judge added:

> The initial tube of blood drawn on 3 June 1998 occurred during a normally scheduled medical visit and was drawn for medical purposes to monitor the accused's diabetes.
>
> The second tube of blood drawn on 3 June 1998 was drawn solely for law enforcement purposes at the request of NCIS and was not drawn for any medical purpose.
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> * * *
>
> The VA hospital staff obtained the accused's consent to draw blood for medical purposes. The VA hospital staff did not, however, tell the accused that a second tube of blood would be drawn solely for forensic purposes for use in the [rape] investigation, nor did he give consent for a second tube of blood to be drawn for that purpose.

II. THE TEMPORARY DISABILITY RETIRED LIST

If a servicemember while on active duty becomes disabled, the Service Secretary may retire the member with pay, subject to detailed statutory and regulatory procedures. These procedures provide two basic types of disability retirement -- permanent and temporary. When there is a determination that a disability is "permanent . . . and stable," the Service Secretary may retire the member with pay. 10 USC § 1201. If, however, the disability "may be of a permanent nature," but the circumstances do not permit a final determination that the condition is, in fact, "permanent . . . and stable," the Secretary is required to place the member on the "temporary disability retired list, with retired pay." 10 USC § 1202.

While on the TDRL, a member is required to submit to periodic physical examinations "to determine whether there has been a change in the disability for which he was temporarily retired." Failure to submit to such a periodic examination may lead to termination of retired pay. 10 USC § 1210(a).

When a periodic examination leads to a determination that the member is "physically fit" to perform his or her duties, there are a number of options. The member may be returned to active duty with his or her consent, retired if otherwise eligible for retirement, discharged, or transferred to the inactive reserves. If the member does not consent to a proposed return to active duty, "his status on the temporary disability retired list and his disability retired pay shall be terminated as soon as practicable and the member shall be discharged." 10 USC § 1211(c).

If a member remains on the TDRL for 5 years, the Secretary is required to make a final determination. If there is a determination that the disability "still exists," it is considered at that point to be "permanent . . . and stable," and the member is retired. 10 USC § 1210. If the member is determined to be fit for duty, the service has the same options as when such a

determination is the result of a periodic examination: return to active duty with consent, retirement if otherwise eligible, discharge, or transfer to the inactive reserves.

In United States v. Bowie, 14 U.S.C.M.A. 631, 34 C.M.R 411 (1964), our Court held that members on the TDRL are subject to court-martial jurisdiction under Article 2, which includes jurisdiction over retired members who are entitled to pay. See Art. 2(a)(4), UCMJ, 10 USC § 802(a)(4). We specifically noted the potential for recalling persons on the TDRL to active duty, particularly in times of national need. 14 U.S.C.M.A. at 632, 34 C.M.R. at 412.

III. DISCUSSION

A. Applicability of Mil. R. Evid. 312(f) to Members on the TDRL

At trial and on appeal, the Government has relied on Mil. R. Evid. 312(f), Manual for Courts-Martial, United States (1998 ed.), which provides:

> Nothing in this rule [dealing with admissibility of evidence obtained from "body views and intrusions"] shall be deemed to interfere with the lawful authority of the armed forces to take whatever action may be necessary to preserve the health of a servicemember. Evidence or contraband obtained from an examination or intrusion conducted for a valid medical purpose may be seized and is not evidence obtained from an unlawful search or seizure within the meaning of Mil. R. Evid. 311.

As noted by the Court below, "the sole basis offered by the Government for the admissibility of the . . . [evidence] is that it was obtained as a result of an intrusion conducted for a valid medical purpose, as authorized by Mil. R. Evid. 312(f)." 52 M.J. at 508. The Government has not contended that the evidence in question was obtained as a result of any of the other rules

governing probable cause and non-probable cause searches and seizures. See id.

There is no exclusion under the Military Rules of Evidence for members on the TDRL. Mil. R. Evid. 1101(a), entitled "Rules applicable," provides: "Except as otherwise provided in this Manual, these rules apply generally to all courts-martial . . . ." Subsection (d) of that rule, entitled "Rules inapplicable," contains no indication that the Rules are not applicable to persons on the TDRL, nor is there anything elsewhere in the Manual for Courts-Martial that would exempt members on the TDRL from Mil. R. Evid. 312(f).

The court below asserted, however, that the military services do not rely on members on the TDRL to perform military missions. In its view, application of Mil. R. Evid. 312(f) to persons on the TDRL would violate the Fourth Amendment because the rule is not a "needed exception to the Fourth Amendment protections applicable to the general populace based upon military exigencies." 52 M.J. at 510.

We do not agree with the lower court's assessment of the TDRL. The exercise of court-martial jurisdiction over members on the TDRL, as affirmed in Bowie, underscores the continuing military status of a member on the TDRL, even if the member is not then performing regular duties. Court-martial jurisdiction reflects the statutory concept that the TDRL is a "temporary" assignment, not a permanent separation from active duty. Congress expressly denominated status on the TDRL as "temporary" and specifically required members on the TDRL to undergo periodic physical examinations to determine whether each member is "physically fit to perform" military duties. 10 USC § 1210(f).

The statutory requirement that a member consent to return to active duty does not diminish the interest of the military in the member's fitness for duty while on the TDRL. The detailed statutory provisions for return to duty reflect a congressional expectation that servicemembers who are determined to be fit

for duty, and who thereby lose entitlement to retirement pay, may well seek to return to duty after receiving a fitness determination -- whether motivated by patriotism, financial interest, or other considerations. See, e.g., Craft v. United States, 544 F.2d 468, 210 Ct. Cl. 170 (1976) (holding that the service erred in finding unfit for duty a servicemember who sought to return to active duty).

Moreover, even if a member on the TDRL is finally determined to be unfit for duty and is retired for physical disability, the member retains military status and may be recalled to active duty under certain circumstances. See, e.g., Akol v. United States, 167 Ct. Cl. 99 (1964) (wartime needs required recall to active duty of servicemembers who had been retired for physical disability); cf. McCarty v. McCarty, 453 U.S. 210, 222, 69 L. Ed. 2d 589, 101 S. Ct. 2728 (1981) (discussing amenability of non-disability retirees to UCMJ jurisdiction and recall to active duty).

Under the lower court's view of the law, a person on the TDRL observed using an illegal drug could be tried and convicted by court-martial, so long as the prosecution did not rely on evidence obtained under Mil. R. Evid. 312(f). If, however, bodily fluids extracted during a routine medical examination of a person on the TDRL reflected the same or a greater level of drug abuse, the lower court's ruling would preclude prosecution if the only evidence was obtained through a medical examination covered by Mil. R. Evid. 312(f). We do not agree that the Constitution requires such an anomaly. The constitutional considerations that support the exercise of court-martial jurisdiction over a military member on the TDRL -- the receipt of military pay and continuing military status -- are no less significant when it comes to the use of evidence obtained during a valid medical procedure concerning the member's continued fitness for military duty.

In view of the receipt of military pay and the potential for further active duty service by members who are temporarily

removed from active duty by reason of disability, we conclude that evidence obtained in compliance with Mil. R. Evid. 312(f) may be used in a court-martial of a person on the TDRL.

B. Application of Mil. R. Evid. 312(f) to Appellee

The parties appear to agree that insertion of the needle into appellee's arm and extraction of the first vial of blood was undertaken for a "valid medical purpose" and was "necessary to preserve the health of a servicemember." Under the plain language of Mil. R. Evid. 312(f), if some of the blood in the first vial was made available to the NCIS for its investigative purposes, any evidence relating thereto would be admissible.

The prolonged insertion of the needle to extract a second vial of blood, solely for law enforcement purposes, raises a separate question under Mil. R. Evid. 312(f). In United States v. Fitten, 42 M.J. 179 (CMA 1995), our Court unanimously upheld under Rule 312(f) the taking of a second bottle of urine for command investigation purposes when the catheterization and taking of the first bottle of urine was for a medical purpose. We noted that taking the second bottle of urine had only "a de minimis impact by prolonging the flow of urine only long enough to fill the second bottle." Id. at 182. Under the circumstances of a de minimis intrusion, we concluded that the intrusion did not violate the Fourth Amendment or the Military Rules of Evidence.

In any further proceedings in the present case concerning admissibility of the evidence at issue, the military judge will need to determine -- in light of Fitten -- whether the prolonged intrusion of the needle in appellee's arm while a second vial was placed on the vacuum needle, and then for some additional period while the blood was extracted into the vial, was a de minimis intrusion with respect to the Fourth Amendment and Mil. R. Evid. 312(f). In determining whether Fitten permits admission of the evidence at issue, the military judge should include in his consideration the effects of the type of intrusion,

the length of the prolonged insertion, the quantity of fluid extracted, the nature of the fluid extracted, and whether there is a legally significant difference between the nature of the fluid extracted in this case as compared to Fitten (e.g., blood versus urine).

IV. DECISION

The first certified question is answered in the affirmative. Accordingly, the decision of the United States Navy-Marine Corps Court of Criminal Appeals is reversed, and the case is returned to the Judge Advocate General of the Navy for remand to the court-martial for trial on the merits. Upon appropriate motion at such trial, the military judge shall consider the issues raised by the second certified question in light of this opinion.

APPENDIX B

UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

UNITED STATES Appellant	) NMCM No. 9900769)
v.	) OPINION OF THE U.S) NAVY-MARINE CORPS) COURT OF CRIMINAL
Walter S. Stevenson Hospital Corpsman Third Class (E-4) U.S. Navy (Retired) Appellee	) APPEALS ON APPEAL) BY THE UNITED STATES)) PUBLISH) Decided 18 October 1999

LT TIMOTHY E. CURLEY, JAGC, USNR, Appellate Government Counsel
LT M. ERIC EVERSOLE, JAGC, USNR, Appellate Defense Counsel
LT OMAR R. LOPEZ, JAGC, USNR, Appellate Defense Counsel

TROIDL, Senior Judge:

On 5 February 1999, a charge alleging that the appellee committed rape on or about 23 November 1992, in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920 (1994), was referred for trial by a general court-martial. Following arraignment, the appellee filed a motion to suppress "DNA [deoxyribonucleic acid] evidence obtained from an illegal blood seizure." Appellate Exhibit VII. The motion was duly litigated and, on 27 April 1999, the military judge granted the motion. Trial counsel provided timely notice of the Government's intent to appeal the military judge's ruling and the Government subsequently filed a timely appeal under Article 62, UCMJ.

After the Government filed its brief asserting a single assignment of error,[1] the appellee submitted an Answer in which he asserted one additional assignment of error[2] as providing "additional or alternate grounds for affirming the [military judge's] ruling." *United States v. Lincoln*, 42 M.J. 315, 320 (1995)(quoting *Dandridge v. Williams*, 397 U.S. 471, 475-76, n.6 (1970)). The Government subsequently moved to dismiss the additional assignment of error as being outside the jurisdiction of this court. Having carefully considered the record of trial, the Government's Brief, the appellee's Answer, the Government's Reply and Motion, and the superb oral arguments by appellate counsel, we grant the Government's motion to dismiss the additional assignment of error, finding that the statute of limitations does not provide an "additional or alternate" grounds for affirming a suppression ruling. Additionally, we affirm the military judge's ruling suppressing the second tube of blood drawn from the appellee on 6 June 1998, along with any derivative evidence gained therefrom.

Standard of Review

This Court may review the military judge's determinations "only with respect to matters of law." Art. 62(b), UCMJ; RULE FOR COURTS-MARTIAL 908, MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.). "Reversal of an interlocutory ruling of a military judge can only result where that judge committed an error of law." *United States v. Postle*, 20 M.J. 632, 636

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[1] THE MILITARY JUDGE ERRED IN SUPPRESSING DNA EVIDENCE FROM THE ACCUSED'S BLOOD. SINCE THE ACCUSED WAS A MEMBER OF THE MILITARY ON THE TEMPORARY DISABILITY RETIRED LIST AND HIS BLOOD WAS ALREADY BEING DRAWN FOR A VALID MEDICAL PURPOSE, THE DNA EVIDENCE IS ADMISSIBLE UNDER MIL.R.EVID. 312(f).

[2] THIS COURT MUST DISMISS THE CHARGE OF RAPE WITH PREJUDICE BECAUSE THE STATUTE OF LIMITATIONS FOR THE CRIME HAS EXPIRED.

(N.M.C.M.R. 1985). We are bound by the military judge's determinations of fact unless they are "unsupported by the evidence of record or was clearly erroneous." *United States v. Middleton*, 10 M.J. 123, 133 (C.M.A. 1981). We conduct a *de novo* review of his conclusions of law.

Findings of Fact

We start by adopting findings of fact 1-13 and 15-25, as contained in the military judge's ruling of 27 April 1999, finding that they are supported by the evidence of record and are not clearly erroneous. *Id.* We decline to adopt finding of fact 14, finding no evidence in the record that NCIS was notified in advance that the appellee's "blood would be drawn on 3 June 1998 in connection with a routine medical visit."

The findings of fact reveal that Mrs. [KT], the dependent wife of a Sailor, complained to authorities that she was violently raped at knifepoint in her on-base residence in Hawaii, on 23 November 1992. Blood and semen samples were obtained during a subsequent medical examination of Mrs. [KT]. The petitioner was an active duty petty officer stationed in Hawaii at the time of the attack. The Naval Criminal Investigative Service [NCIS] closed the investigation into the rape of Mrs. [KT] as unresolved in August 1993. In 1994, the petitioner was released from active duty and placed on the Temporary Disability Retired List [TDRL].[3] The Government did not establish the basis for the appellee's assignment to the TDRL during the litigation of this motion.

In November 1997, after reviewing police reports which implicated the appellee as a suspect in a "Peeping Tom" incident that occurred in the vicinity of Mrs. [KT's] residence

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[3] The TDRL is "a list maintained by the CNO [Chief of Naval Operations] or CMC [Commandant of the Marine Corps] of members who are UNFIT FOR DUTY because of physical disability" and "whose disabilities are not yet determined to be stabilized or permanent." Secretary of the Navy Instruction 1850.4C, Part G, ¶ 1044 (Ch-I, 22 Jul 1993) (emphasis in original).

and within the general timeframe of the alleged rape, NCIS reopened the rape investigation. Thereafter, NCIS Special Agent [SA] McNutt, assigned to the NCIS office in Memphis, Tennessee, received a lead from the NCIS office in Hawaii asking him to interrogate the appellee and to ask the appellee to provide NCIS with a sample of his blood.

After learning that the appellee was receiving medical treatment at the Veteran's Administration [VA] Hospital in Memphis, SA McNutt contacted the VA and was allowed to review the appellee's medical records. During this review, SA McNutt learned that the appellee was being treated for diabetes and a mental disorder. Concerned for his safety and that of the appellee, SA McNutt decided it was premature to contact the appellee about the investigation. Instead, SA McNutt obtained the appellee's blood type from the VA and conveyed this information to the NCIS headquarters. Comparison of the appellee's blood type to the information obtained from the blood and semen samples obtained during the 1992 medical examination of Mrs. [KT] did not eliminate the appellee as a suspect in the rape investigation.

Again asked to obtain a specimen of the appellee's blood and recognizing that the appellee received routine treatment at the VA Hospital, which included drawing blood to monitor his diabetes, SA McNutt contacted and requested the assistance of Mr. Ron Dooley, the Regional Counsel for the VA. SA McNutt informed Mr. Dooley that the appellee was a suspect in a rape investigation and asked if NCIS could obtain a specimen of the appellee's blood whenever he might present himself at the VA Hospital in the normal course of his treatment. Stating that the VA routinely provided blood specimen to the police in connection with DUI investigations, Mr. Dooley said that it should be possible for the VA to comply with the NCIS request. However, Mr. Dooley requested that NCIS submit a memo formalizing the requested assistance. The memo, which requested that NCIS be notified the next time the appellee presented to the VA Hospital to have his blood drawn, was

prepared on or about 21 May 1998 and was faxed to the VA Hospital in Memphis on 27 May 1998.

On 3 June 1998, the appellee appeared at the VA Hospital in Memphis for a regularly scheduled medical visit and consented to having blood drawn for the purpose of medical treatment. The medical staff inserted a vacuum needle (with an open end) into the appellee's arm, then affixed a tube to the needle and drew blood for medical purposes. The medical staff then removed the first tube and, within five or six seconds, affixed a second tube to the needle for the sole purpose of obtaining the blood specimen requested by NCIS. After the second specimen had been obtained, the vacuum needle was removed from the appellee's arm.

The appellee's 3 June 1998 visit to the VA Hospital was not instigated by NCIS and NCIS did not have a representative present when either tube of blood was drawn. NCIS was notified of the availability of the blood specimen and secured it from the VA Hospital on 3 June 1998. The specimen was then forwarded to a laboratory for comparison with the forensic evidence obtained from Mrs. [KT].[4] The specimen contained in the second tube was not used for any medical purpose.

The appellee was not aware of the purpose underlying the drawing of the second tube of blood and did not authorize the medical personnel to draw his blood for any purpose other than medical treatment. The Government concedes that the blood drawn into the second tube on 3 June 1998 was not obtained pursuant to a consent search, a search authorization based upon probable cause, or upon probable cause but without a search authorization and under exigent or special circumstances.

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[4] On 4 August 1998, the laboratory reported that the DNA profiles developed from the November 1992 forensic evidence were attributable to Mrs. [KT], the appellee, and one unknown individual.

On 9 October 1998, the Secretary of the Navy authorized the trial of the petitioner, as a retiree, for the rape of Mrs. [KT]. The appellee was apprehended on 17 December 1998 and ordered into pretrial confinement. A single specification alleging that the petitioner raped Mrs. [KT] was referred by Commander, Navy Personnel Command, for trial by general court-martial on 5 February 1999. The petitioner was arraigned on 17 February 1999. On 18 March 1999, the petitioner moved to suppress the second tube of blood drawn at the VA hospital on 3 June 1998. Appellate Exhibit VII. After the filing of the Government's Response and the appellee's Reply thereto (Appellate Exhibits VIII and IX), an Article 39(a), UCMJ, session was held on 24 March 1999, during which evidence on the motion was presented. Record at 1-45. On 27 April 1999, the military judge granted the appellee's motion, suppressing the vial of blood and any derivative evidence gained therefrom, ruling that Military Rule of Evidence 312(f), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.) was inapplicable in this case and that the search and seizure violated both the Fourth and Fifth Amendments to the Constitution.

The Government thereafter filed a timely notice of appeal of the military judge's ruling.[5] On appeal, the Government

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[5] Following the Government's filing of its Notice of Appeal, the appellee filed a Motion for Appropriate Relief with the trial military judge requesting review of his continued pretrial confinement. After the military judge ruled that he did not have the authority to hear the motion during the pendency of the appeal, the appellee petitioned us for a *Writ of Habeas Corpus* or, in the alternative, a *Writ of Mandamus*. We recently denied the petition for a *Writ of Habeas Corpus*, but issued a *Writ of Mandamus* in which we ordered the military judge to review the propriety of the appellee's continued pretrial confinement. In our order, we held that:

> Having considered the evolution of R.C.M. 908(b)(4)(A) and (b)(9), we find that the military judge was incorrect in concluding that he was barred from hearing the petitioner's request for release from confinement pending the

asserts that the military judge abused his discretion in suppressing the evidence at issue, his ruling having been based upon an erroneous understanding of the law. The appellee argues that the Military Rules of Evidence do not apply in this case, that the search and seizure violated the Fourth Amendment, and would have us affirm the military judge's suppression ruling.

Applicability of the Military Rules of Evidence

Preliminarily, we find that the Military Rules of Evidence do apply in this case, as they do in every court-martial. *See* MIL. R. EVID. 101 and 1101. We also agree with the military judge that the extra tube of blood was drawn by VA medical

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Government appeal. Although R.C.M. 908(b)(4)(A), both as originally drafted and subsequently amended, precludes sessions of court pending resolution of the appeal as to matters related to the offense(s) impacted by the military judge's ruling, we find that the review of an individual's pretrial confinement status does not impact the charges and specifications pending resolution of the appeal. As we stated in *Frage v. Edington*, 26 M.J. [927] at 928, 'under normal circumstances, the decision whether to confine an accused during the pendency of a Government appeal rests within the discretion of the convening authority and the military judge in accordance with the guidelines set forth in R.C.M. 305(d).' R.C.M. 908(b)(9) does not change this view, since it merely tells the accused's commander what factors he should consider in deciding whether or not to continue pretrial confinement during the pendency of an appeal. We find that this subsection does not explicitly preclude action by the military judge and, since it is modeled after 18 U.S.C. § 3143, it implicitly seeks to ensure that an accused in pretrial confinement pending a Government appeal is in the same position as any other pretrial detainee, to include review by a military judge in accordance with R.C.M. 305(j).

Stevenson v. Krantz and Hinkle, No. 9900769 (N.M. Ct. Crim. App. 27 Aug 1999) (unpublished order) (footnotes omitted).

personnel solely in response to the memorandum from NCIS, and thus they acted as agents for NCIS when they performed that procedure. As a result, the search and seizure of the second tube of blood was "conducted, instigated, or participated in by" military personnel or their agents and the search or seizure is unlawful if "in violation of the Constitution of the United States as applied to members of the armed forces, an act of Congress applicable to trials by court-martial that requires exclusion of evidence obtained in violation thereof, or Mil.R.Evid. 312-317." MIL. R. EVID. 311(c)(1).

Both the Fourth and Fifth Amendments provide protections in the area of searches and seizures and are generally applicable to the military absent, a showing of a need for variation based upon military exigencies. *Murray v. Haldeman*, 16 M.J. 74, 81 (C.M.A. 1983)(quoting *United States v. Middleton*, 10 M.J. 123, 127 (C.M.A. 1981)); *see also United States v. Fitten*, 42 M.J. 179, 180 (1995). The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Compliance with the Due Process Clause of the Fifth Amendment is an issue when a search or seizure is conducted in such a way that it does "more than offend some fastidious squeamishness or private sentimentalism about combating crime too energetically" but rather "is conduct that shocks the conscience." *Rochin v. California*, 342 U.S. 165, 172 (1952).

The Supreme Court has been particularly sensitive to cases involving bodily intrusions, stating in *Schmerber v. California*, 384 U.S. 757 (1966), that "the Fourth Amendment's proper function is to constrain not all intrusions as such, but against

intrusions which are not justified in the circumstances." The Court went on to write that the "interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that the desired evidence might be obtained." *Schmerber*, 384 U.S. at 770.

Against this backdrop, Section III of the Military Rules of Evidence established exclusionary rules and related matters concerning self-incrimination, search and seizure, and eyewitness identification. Of interest in this case are Rules 311 through 316. The appellee, having made a timely motion to suppress [Mil.R.Evid. 311(a)(1)] and having an adequate interest in both his person and in the blood seized [Mil. R. Evid. 311(a)(2)], the burden is on the Government to establish, by a preponderance of the evidence, that the appellee's blood was not obtained as a result of an unlawful search and seizure. MIL. R. EVID. 311(e).

The Government concedes that the search and seizure in this case was not accomplished pursuant to a search authorization and we concur with the military judge that the evidence presented by the Government did not amount to probable cause. MIL. R. EVID. 315 and 316. Additionally, as conceded by the Government, the second tube of blood was not obtained based upon the consent of the appellee, or upon any of the other available searches not requiring probable cause as enumerated in Mil. R. Evid. 314. The sole basis offered by the Government for the admissibility of the second tube of blood and the derivative evidence obtained therefrom is that it was obtained as a result of an intrusion conducted for a valid medical purpose, as authorized by Mil. R. Evid. 312(f).[6]

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[6] Mil. R. Evid. 312(f) reads as follows:

Intrusions for valid medical purposes. Nothing in this rule shall be deemed to interfere with the lawful authority of the armed forces to take whatever action may be necessary to preserve the health of a servicemember. Evidence or contraband obtained from an examination or intrusion conducted for a valid medical purpose may

Mil. R. Evid. 312(f)

The military judge ruled that Mil. R. Evid. 312(f) "is limited in scope and should be narrowly construed to apply only to members of the 'active duty' armed forces." Ruling on the Motion to Suppress of 27 April 1999, Discussion, P 6. He went on to restate his holding, albeit somewhat differently, in his summation, stating that Mil. R. Evid. 312(f) was "inapplicable to retired servicemembers on [the] TDRL list, at least to the extent that the medical examination or intrusion was conducted for purposes other than ascertaining the status of a member's medical condition vis--vis return to an active duty status." *Id.* at P 8a. The military judge also held that the search and seizure in this case violated the appellee's rights under both the Fourth and Fifth Amendments to the Constitution.

Mil. R. Evid. 312(f) seeks to make reasonable, within the context of the Fourth Amendment, the search for and seizure of evidence obtained from a bodily intrusion conducted for a valid medical purpose without a search authorization or probable cause. The reason cited as providing the foundation for the rule is the lawful authority of the armed forces to take whatever action is necessary to preserve the health of a servicemember. This Rule is without parallel in the Federal Rules of Evidence and recognizes the special needs of the armed forces. We accept that the armed forces have a valid need to be able to take actions necessary to preserve the health of active duty servicemembers, all of whom are counted upon to ensure the military is able to carry-out its mission in peacetime or during periods of armed conflict. Accordingly, unlike the civilian populace, active duty servicemembers capable of making health care decisions related to their own bodies may be required to accept medical treatment believed by their superiors to be necessary to preserve their health even over objections and without judicial intervention. *See United*

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be seized and is not evidence obtained from an unlawful search or seizure within the meaning of Mil.R.Evid. 311.

States v. Fitten, 39 M.J. 659, 661, 676-77 (N.M.C.M.R. 1993), *aff'd*, 42 M.J. 179 (1995). As was the case in *Fitten*, even if this medical treatment involves an intrusion into the body, so long as it is conducted for a valid medical purpose, by individuals with appropriate medical qualifications, and in an appropriate medical setting, the intrusion will not amount to an unreasonable search and seizure in violation of the Fourth Amendment. Additionally, if the intrusion itself does not shock the conscience, there is no violation of the Due Process Clause of the Fifth Amendment.

The plain language of Mil. R. Evid. 312(f) does not limit its applicability to active duty servicemembers. Unlike the military judge, we will not look behind the plain meaning of this language in an attempt to discern whether the President intended the rule to apply to members of the TDRL. *See United States v. Leonard*, 21 M.J. 67, 69 (C.M.A. 1985); *United States v. Ferguson*, 40 M.J. 823, 830 (N.M.C.M.R. 1994). We must, however, determine whether application of the rule to members of the TDRL would be "in violation of the Constitution." MIL. R. EVID. 311(c)(1).

In making this determination, we look to both the statutes governing retirement or separation from the armed forces by reason of physical disability, to include assignment to the TDRL, and the Navy policy implementing those statutes. 10 U.S.C. §§ 1201-1221 (1999); Secretary of the Navy Instruction 1850.4C (Ch. 1, 22 Jul 1983). In administering the TDRL for the Navy, the Chief of Naval Personnel is tasked with maintaining an accurate accounting of authorized members, designating medical facilities and directing members to undergo periodic physical examinations, and monitoring failures to report to the required examinations. SECNAVINST 1850.4C at Enclosure (7), ¶ 7002. Individuals on the TDRL are required to maintain a current address with the Finance Center and submit to periodic physical examinations ordered by the Chief of Naval Personnel. *Id.* at ¶¶ 7003 and 7005. If an individual fails to comply with an order for a physical examination, the

Chief of Naval Personnel may either accept a substitute examination, or take a series of actions starting with a stoppage in pay, followed by administrative removal from the TDRL and ultimately the administrative discharge of the individual. *Id.* at ¶¶ 7006 and 7008; 10 U.S.C. § 1210(a). Enlisted members of the TDRL who submit to the periodic examinations and are found fit for duty, cannot be ordered back to active duty without their consent and even then only if they are otherwise qualified for reenlistment. SECNAVINST 1850.4C. at Enclosure (7), ¶7019; 10 U.S.C. § 1211.

Based upon the statutes and policy guidance governing the TDRL, we find that: 1) the armed forces do not rely upon members of the TDRL to carry-out their mission even though they remain servicemembers and are subject to both the UCMJ and trial by court-martial; 2) the armed forces do not have the same need to be able to take actions necessary to preserve the health of members of the TDRL as they have for active duty servicemembers; 3) members of the TDRL are not subject to involuntary medical treatment believed to be necessary to preserve their health to any extent greater than the general populace; and, 4) there is no showing that the application of Mil. R. Evid. 312(f) to members of the TDRL is a needed exception to the Fourth Amendment protections applicable to the general populace based upon military exigencies. Applying the Fourth Amendment to the facts in this case and in view of the inapplicability of Mil. R. Evid. 312(f) to the appellee, we find that the search and seizure conducted in this case was unreasonable.

Accordingly, we find that the military judge was correct in his ruling that Mil. R. Evid. 312(f) is not applicable to members of the TDRL and that the search and seizure in this instance was unreasonable, thus violating the Fourth Amendment. We do not find, however, a violation of the appellee's rights under the Due Process Clause of the Fifth Amendment.

Disposition

We affirm the military judge's ruling suppressing the specimen of blood drawn for NCIS on 6 June 1998 and any derivative evidence gained therefrom. We return the record for a trial on the merits.

Senior Judge LEO and Judge ANDERSON concur.

Appendix C

GENERAL COURT-MARTIAL
SOUTHEAST JUDICIAL CIRCUIT
NAVY-MARINE CORPS TRIAL JUDICIARY

UNITED STATES	)	**RULING**
	)	
V.	)	**(MOTION TO SUPPRESS**
	)	**EVIDENCE)**
WALTER S. STEVENSON	)	
HM3, USN (Retired)	)	**27 April 1999**
308-70-4093	)	

Preliminary Statement: The defense has asked the Court to suppress DNA evidence allegedly obtained as a result of an illegal blood seizure of the accused

Findings of Fact:

1. Kari Thiele was allegedly raped at her on-base residence in Hawaii on 23 November 1992.

2. Medical staff at Tripler Army Medical Center performed a rape kit on Ms. Theile. Blood and semen samples were obtained.

3. The investigation into the alleged rape was closed as unresolved in August 1993 by the Naval Criminal Investigative Service (NCIS).

4. The accused was on active duty serving as a member of the Navy at the time of the alleged rape. He was discharged from active duty and placed on the temporary disabled retired list (TDRL) in 1994.

5. Sometime thereafter, review of police reports revealed that the accused had been implicated as a possible "Peeping Tom" near the area of the Thiele residence within the general time

frame of the alleged rape. With this new information, the investigtion of the Thiele rape was reopened by NCIS in November 1997.

6. Special Agent John McNutt, of NCISA Memphis, received a lead from Hawaii asking that he interrogate the accused and request a permissive authorization for the search and seizure of the accused's blood.

7. Special Agent McNutt learned that the accused was receiving medical treatment for diabetes at the Veterans Administration Hospital located in Memphis, Tennessee. He reviewed the accused's medical records, which revealed the accused was being treated for Schizophrenia and diabetes. The accused had apparently been admitted as a patient for suicidal/homicidal ideation. The accused was later released to outpatient status as the investigation progressed.

8. NCIS determined that for the safety of the agent and accused, it would be premature to seek a permissive authorization from the accused for the search seizure of his blood. NCIS was also aware the accused was on medication. No attempt was made to obtain a sample of the accused's blood.

9. NCIS obtained the accused's blood type was forwarded to NCIS headquarters for comparison with blood and semen samples obtained during the rape kit examination of Ms. Thiele at Tripler Army Medical Center in 1992. The blood type comparison did not eliminate the accused as a suspect in the rape.

10. Special Agent McNutt was requested to obtain a sample of the accused's blood. He was aware the accused routinely presented to the VA hospital to have his blood drawn and monitored in order to regulate diabetic medications. He contacted Ron Dooley, regional counsel for the VA hospital for assistance.

11. Mr. Dooley was asked if NCIS could get a sample of the accused's blood whenever the accused might present to the VA hospital in the normal course of his diabetes treatment evaluation. Mr. Dooley was informed of the accused's status as a suspect in a rape investigation.

12. Special Agent McNutt testified that Mr. Dooley indicated blood samples were provided to civilian police agencies in connection with DUI investigations, so it should be possible to provide a blood sample of the accused to NCIS. He requested NCIS furnish a memo to the VA hospital requesting the same.

13. The memo was prepared on or about 21 May 1998 and faxed to the VA hospital on or about 27 May 1998. The memo asked that NCIS be notified the next time the accused presented to the VA hospital to have his blood drawn.

14. NCIS received a phone call from the VA hospital notifying them that the accused's blood would be drawn on 3 June 1998 in connection with a routine medical visit.

15. Blood was drawn from the accused by hospital staff of the VA hospital Memphis on 3 Jun 1998. This was accomplished by inserting a vacuum needle (with an open end) into the accused's arm. While this needle was in his arm, one tube of blood was drawn for treatment and diagnosis of his diabetes. This initial tube was removed from the vacuum needle and replaced within five or six seconds with a second tube. The second tube was used by hospital staff to obtain a separate blood sample for NCIS. When the second tube was filled, hospital staff removed the needle from the accused's arm. The same vacuum needle was in the accused's arm during the entire time both tubes were filled.

16. NCIS was not present when either tube of blood was drawn, and had made no arrangements to have the accused present on a particular day to have his blood drawn. NCIS did not instigate or participate in the drawing of the initial tube of blood.

17. The initial tube of blood drawn on 3 June 1998 occurred during a normally scheduled medical visit and was drawn for medical purposes to monitor the accused's diabetes.

18. The second tube of blood drawn on 3 June 1998 was drawn solely for law enforcement purposes at the request of NCIS and was not drawn for any medical purpose.

19. NCIS seized the second tube of blood and sent it to the U.S. Criminal Investigative Laboratory for DNA comparison with the forensic evidence associated with the 1992 rape of Ms. Thiele.

20. The VA hospital staff obtained the accused's consent to draw blood for medical purposes. The VA hospital staff did not, however, tell the accused that a second tube of blood would be drawn solely for forensic purposes for use in the Thiele investigation, nor did he give consent for a second tube of blood to be drawn for that purpose.

21. The government never sought consent from the accused to draw a sample of his blood for law enforcement purposes. The second tube of blood drawn was not done pursuant to a consent search. The government conceded during the motion session that the second tube of blood was not done pursuant to a consent search.

22. The second tube of blood was not done as part of a search authorized upon probable cause. The government conceded during the motion session that the second tube of blood was not done as part of a search authorized upon probable cause.

23. The second tube of blood drawn was not done as part of a search upon probable cause without authorization, but under exigent or special circumstances. The government conceded during the motion session that the second tube of blood was not done as part of a search authorized upon probable cause without authorization, but under exigent or special circumstances.

24. The accused has not been ordered to active duty, but remains in a TDRL retired status. Jurisdiction over him is asserted pursuant to 10 U.S.C., section 802(a)(4). He is currently in pretrial confinement in the Naval Pretrial Confinement Facility on board Naval Air Station, Pensacola.

25. In sum,

a. The accused presented to the VA hospital for medical treatment.

b. The VA hospital staff had a duty to follow generally accepted standards of medical care in evaluating his medical condition.

c. The VA hospital staff obtained the consent of the accused to make a needle intrusion to draw blood necessary to do blood monitoring for his diabetic condition. A single needle intrusion was used to withdraw two tubes of blood.

d. The first tube of blood drawn was done so for a valid medical purpose and was done with the accused's consent. This tube of blood was *not* seized by NCIS.

e. The second tube of blood drawn was done so without the consent of the accused, exceeded the accused's informed consent as to its medical purpose, was not done with "informed" consent as to it law enforcement purpose, and was not drawn for a valid medical purpose.

f. The second tube of blood would not have been drawn "but for" the request made to the VA hospital by NCIS.

Discussion:

1. The needle intrusion was done "primarily for medical reasons," and was accomplished in a hospital setting by medical personnel following receipt of the accused's informed consent as to its medical use. No question as to the appropriateness of that intrusion would exist absent the drawing of the second tube of blood.

2. The second tube of blood was not drawn as an afterthought, but rather was within the scope of the procedure contemplated before the needle was inserted through the skin. In this respect, the needle intrusion was *not* done with the accused's "informed" consent, was not done for a valid medical purpose, and was therefore nonconsensual.

3. No medical purpose was served by drawing the second tube of blood. The VA hospital staff was engaged in action instigated by and solely for the benefit of law enforcement when the second tube of blood was drawn. In essence, the hospital staff was acting as a servant or agent of NCIS at that moment when the second tube of blood was drawn. M.R.E. 311(a). The prosecution has the burden of proving by a preponderance of the evidence that the evidence was not obtained as a result of an unlawful search or seizure. M.R.E. 311(e).

4. Evidence obtained as a result of an unlawful search and seizure made by a person acting in a governmental capacity, is inadmissible against an accused, if the accused makes a timely objection and the accused has a reasonable expectation of privacy in the person to be searched. M.R.E. 311(a). The prosecution has the burden of proving by a preponderance of the evidence that the evidence was not obtained as a result of an unlawful search or seizure. M.R.E. 311(e).

5. The Government proffers M.R.E. 312(f) as their sole basis for asserting the admissibility of the DNA blood derivative evidence. In support of their argument they point to *United States v. Finan*, 39 M.J. 659 (N.M.C.M.R. 1993), aff'd, 42 M.J. 179 (1995). In their view, if the intrusion of the needle through the skin was for a proper medical purpose, M.R.E. 312(f) permits the blood extracted, to be used for any purpose, including law enforcement purposes. But the facts of this case differ in certain important respects:

a. The accused was on the TDRL list; he was not on active duty.

b. The intrusion occurred at a VA hospital; it did not occur at a military medical treatment facility.

c. The intrusion was not accomplished to ensure his "fitness for duty" in any respect. M.R.E. 312(f).

d. The intrusion was not time-sensitive required for treatment or diagnosis. Delay to obtain a warrant or authorization based on probable cause implicated no concerns that evidence might disappear or be destroyed.

e. Probable cause to believe the accused's blood might contain evidence of a crime did not exist. "Humman dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desire evidence might be obtained." *Schmerber v. California*, 384 U.S. 757, at 770, 86 S.Ct. 1826, 16 L.Ed.2d (1966).

f. The needle intrusion was accomplished for a duel medical/law enforcement purpose; in *Fitten*, the catheter was inserted solely for medical purpose. 42 M.J. at 180 and 39 M.J. at 662. The catheter was not inserted at the request of law enforcement or was otherwise related to the existence of a search and seizure authorization.

g. The "seizure" of the tube of blood was not accomplished under a search authorization; in contrast, in *Fitten*, the urine specimen sample was "obtained" following notification to medical authorities of the existence of a search and seizure authorization. 39 M.J. 659, at 662.

h. Consent was obtained by **misrepresenting** the purposes for which the blood would be drawn; in contrast, in *Fitten*, the accused was forthrightly asked by the command's chief investigator/urinalysis coordinator to provide a urine sample for non-medical use.

i. Blood is not bodily waste, unlike urine, which will necessarily be discharged with time.

6. This Court holds M.R.E. 312(f) is limited in scope and should be narrowly construed to apply only to members of the "active duty" armed forces. The following general comments are noted:

a. With respect to the government's M.R.E. 312(f) argument, the defense has submitted an affidavit for the Court's consideration from the primary author of the search and seizure aspects of the Military Rules of Evidence. The Court treats the views contained in the affidavit as it might consider any learned treatise.

b. The Court advises the parties that it contacted an outside expert, Professor David Schlueter, of St. Mary's University and a co-author of the Military Rules of Evidence Manual, in an effort to gain his views on this interesting issue. Professor Schlueter appropriately advised the Court that he had previously reviewed and provided comment to the defense team on a draft of their suppression motion. As a result, the conversation between the Court and Professor Schlueter did not encompass a substantive exchange of comment with him on this issue.

c. Although what has transpired and been argued in this case by the government may not have been contemplated by the drafters of M.R.E. 312(f), it is not unusual that unanticipated results occur whenever legislation is passed or Executive Orders are signed. The question is -- did the President intent that M.R.E. 312(f) be interpreted to apply to members of the military services serving in a retired status. This Court believes not.

d. The Analysis to Section III of the Military Rules of Evidence states various Rules thereunder, which would include M.R.E. 312(f), have no counterpart under the Federal Rules of Evidence as they reflect a codification of law relating to search and seizure. As such, those particular Rules represent something more than mere rules of procedures governing the conduct of courts-martial. The Court believes extreme care

must be used when applying them to court-martial proceedings.

e. An accused in TDRL status is subject to personal jurisdiction under the UCMJ. See, UCMJ Article 2(a)(4). He is also subject to court-martial jurisdiction for offenses committed while in that status. See, UCMJ Article 3(a). But, an accused on the TDRL may not be referred to court-martial absent prior Secretary of the Navy approval. The limitation by imposed by the Secretary of the Navy implicitly demonstrates a difference in perspective when contemplating disciplinary action involving members of the active duty force as contrasted with members of the retired force. It makes sense that persons in a military status other than active duty, e.g., retired and reserve members, might be afforded more protections than those on active duty.

f. Similarly, jurisdiction under the Uniform Code of Military Justice is not unlimited. ("It has never been intimidated by this Court, however, that Article I military jurisdiction could be extended to civilian ex-soldiers who had severed all relationship with the military and its institutions", *Thoth v. Quarles*, 76 S.Ct. 1 (1955)). *Toth* does not bar prosecution of this accused. *Toth*, however, highlights the difference in protections afforded members of our military services and our civilian counterparts.

7. The nonconsensual law enforcement aspect of the intrusion was done without probable cause, without a search warrant or authorization, and without exigent-circumstances, and was done under the auspices — albeit not lawful authority — of the armed forces. In effect, the nonconsensual aspect of the intrusion was bootstrapped onto a valid medical procedure in an attempt to make lawful that which would not otherwise standing alone be lawful. It may be that in some circumstances persons on the TDRL list may be ordered to submit to physical examination which includes blood tests to determine their

eligibility to remain on TDRL vice returning to active duty, but this is not one of those instances.

8. In sum:

a. The court holds M.R.E. 312(f) is inapplicable to retired servicemembers on TDRL list, at least to the extent that the medical examination or intrusion was conducted for purposes other than ascertaining the status of a member's medical condition vis-a-vis return to an active duty status. In this respect the Court notes the defense brief glosses over the distinction in status between members on the TDRL and other retired personnel. Persons are placed on the TDRL as their disabling medical condition may very well improve to permit a return to an active duty status. Although the Court has not researched this issue, it is the Court's understanding that persons placed on the TDRL, for a period of five years, are periodically required to report to appropriate military medical authority for evaluation of their fitness for duty.

b. The Court holds the search encompassed by the insertion of the needle and seizure of the second tube of blood violated the accused's Fourth Amendment right to be free from unreasonable search and seizures.

c. The Court holds the search encompassed by the insertion of the needle and seizure of the second tube of blood violated the accused's Due Process Rights under the Fifth Amendment. At the instigation of the Naval Criminal Investigative Service, a second tube of blood drawn for law enforcement purposes was bootstrapped onto an otherwise valid medical procedure in an attempt to make lawful that which would not otherwise standing alone be lawful. The "informed consent" for this procedure misrepresented the purposes for which the blood drawn would be used. Although the setting, personnel, and procedures used to conduct the actual intrusion involved presumably all reasonable precautions; involved virtually no risk, trauma, or pain involved no unusual or untested procedures; and were in all respects

consistent with the routine intrusion required for monitoring the accused's blood to regulate his diabetic medications — the medical personnel chose not obtain the accused "informed" consent for this procedure, which would have included informing the accused of the duel purpose for which the blood was to be drawn. The Naval Criminal Investigative Service used the VA hospital medical personnel to accomplish indirectly what they could not lawfully accomplish directly. It is not inconceivable that the accused might have a claim against the United States under the Federal Torts Claim Act for damages suffered by him by virtue of the VA hospital's negligence in providing informed consent as to this needle intrusion.

Ruling:

1. The defense motion to suppress evidence is granted.

2. This suppression ruling is limited to the second tube of blood drawn and any derivative evidence gained therefrom. The precise item of evidence, which the defense seeks to suppress was not offered into evidence at the motion session. See, *United States v. Fitten*, 39 M.J. 659 (Judge Mollison's comments on a similar issue at page 670).

3. The Court is mindful of the significance of this ruling.

RAYMOND J. KREICHELT
CAPT, JAGC, USN
CIRCUIT MILITARY JUDGE

Appendix D

United States Court of Appeals for the Armed Forces
Washington, D.C. 20442-0001

UNITED STATES, Appellant	)	USCA Misc. Dkt. No. 00-6001/NA
	)	Crim. App. Dkt. No.
v.	)	99-0769
	)	
Walter S. STEVENSON (308-70-4093), Appellee	)	ORDER

On consideration of appellee's petition for reconsideration of the opinion of the Court reported at 53 M.J. 257 (2000), it is, by the Court, this, 31st day of August, 2000,

ORDERED:

That said petition is hereby denied.

For the Court,

/s/Thomas F. Granahan
Clerk of the Court

cc: The Judge Advocate General of the Navy
Counsel for Appellant (EVERSOLE)
Counsel for Appellee (CURLEY)

Supreme Court, U.S.
FILED
DEC 26 2000
OFFICE OF THE CLERK

(2)

No. 00-919

IN THE
SUPREME COURT OF THE UNITED STATES

WALTER S. STEVENSON, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent.*

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Armed Forces

BRIEF OF NATIONAL INSTITUTE OF MILITARY JUSTICE AND NATIONAL VETERANS LEGAL SERVICES PROGRAM AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

DAVID F. ADDLESTONE
NATIONAL VETERANS LEGAL SERVICES PROGRAM
2001 S St., N.W.
Suite 610
Washington, DC 20009
(202) 265-8305

KEVIN J. BARRY
13406 Sand Rock Court
Chantilly, VA 20151
(703) 968-7247

EUGENE R. FIDELL
(Counsel of Record)
FELDESMAN, TUCKER, LEIFER, FIDELL & BANK LLP
2001 L St., N.W., 2d Floor
Washington, DC 20036
(202) 466-8960

Attorneys for National Institute of Military Justice and National Veterans Legal Services Program

DECEMBER 2000

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NO. 00-919

IN THE
SUPREME COURT OF THE UNITED STATES

WALTER S. STEVENSON, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent.*

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Armed Forces

BRIEF OF NATIONAL INSTITUTE OF MILITARY JUSTICE AND NATIONAL VETERANS LEGAL SERVICES PROGRAM AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

The National Institute of Military Justice ("NIMJ") and the National Veterans Legal Services Program ("NVLSP") respectfully submit this brief as *amici curiae* in support of the petitioner.

INTEREST OF THE *AMICI CURIAE*

NIMJ is a District of Columbia nonprofit corporation organized in 1991.[1] Its overall purpose is to advance the fair administration of justice in the Armed Forces of the United States. NIMJ fosters improved public understanding by such

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[1] No counsel for a party authored this brief in whole or in part. No person or entity other than the *amici* made a monetary contribution to the preparation or submission of this brief.

means as publication of the *Guide to the Rules of Practice and Procedure for the United States Court of Appeals for the Armed Forces* and the monthly *Military Justice Gazette*, and the sponsorship of seminars and training programs. NIMJ has also commented on and proposed changes to military procedural rules, testified before Congress, and appeared as an *amicus curiae* at the petition stage in *Clinton v. Goldsmith*, 526 U.S. 529 (1999), and *Gray v. United States*, No. 00-607. NIMJ's directors include law professors, private practitioners and other experts in the field, none of whom is currently on active duty, but nearly all of whom have served as active duty military lawyers, up to and including flag and general officer ranks. NIMJ is entirely independent of the government and relies exclusively on voluntary contributions for its programs.

NVLSP is a veterans service organization recognized by the Department of Veterans Affairs ("DVA") under 38 U.S.C. § 5902. For more than 20 years, NVLSP has been helping veterans who, because of the effects of military service, have been unable to share in opportunities available to most Americans. NVLSP serves these forgotten veterans through advocacy, education, litigation, training, and publications.

At issue in this case is whether the armed forces may conduct involuntary non-probable-cause searches of retired personnel through the use of DVA's facilities and staff. The facts of the case, the nature of the issue, and the effect of the decision below on the confidence of military retirees that DVA and the armed services will respect their privacy rights all strongly counsel in favor of a grant of certiorari.

Counsel for the parties have consented to the filing of this brief. Copies of their letters have been lodged with the Clerk.

ARGUMENT

1. The facts are highly disturbing. Stevenson, who had been on disability retirement from the Navy since 1994,[2] was receiving medical care from DVA. Suspecting him of rape, the Naval Criminal Investigative Service ("NCIS") wished to obtain a DNA sample to aid in its investigation. As a retired regular entitled to pay, Stevenson remained technically subject to the Uniform Code of Military Justice ("UCMJ"). UCMJ art. 2(a)(4), 10 U.S.C. § 802(a)(4) (1994).

Stevenson was being seen for a psychiatric condition and diabetes at the DVA Medical Center in Memphis, Tennessee. As part of his care, DVA periodically took blood samples from him. Unbeknownst to him (and perforce without his consent), NCIS prevailed upon DVA personnel to take an additional vial of blood (beyond that needed for the purpose of medical treatment) the next time Stevenson appeared as an outpatient. NCIS's sample was taken using the needle that was already in his arm. NCIS lacked probable cause for a search, and no search warrant was sought or issued in connection with the procurement of NCIS's sample.

Military charges ensued, and Stevenson moved to suppress. A Navy captain serving as a military judge granted the motion, and, on interlocutory government appeal, the appellate military judges of the United States Navy-Marine Corps Court of Criminal Appeals affirmed. The Judge Advocate General of the Navy certified the case to the United States Court of Appeals for the Armed Forces, which reversed and remanded for trial on the merits, and determination of whether leaving the needle in Stevenson's arm to take NCIS's blood sample was "a *de minimis* intrusion with respect to the Fourth Amendment and Mil. R. Evid. 312(f)."

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[2] From 1994 to 1999, Stevenson was on the temporary disability retired list. In 1999 he was transferred to the permanent disability retired list.

2. Stevenson's petition properly identifies the legal errors in the decision of the Court of Appeals. NIMJ and NVLSP submit this brief for the limited purpose of indicating (a) the nature and scope of the effect of the decision on review, (b) the process by which the Military Rule of Evidence at issue was developed, and (c) why certiorari should be granted despite the interlocutory nature of the decision below.

a. DVA operates the Nation's largest medical care system. It serves an enormous number of veterans. Military retirees are among the veterans who are eligible for DVA medical care. As of September 30, 1998, there were 1,462,448 military retirees, of whom 112,400 were either temporarily or permanently retired for disability. Dep't of Defense, *Defense Almanac* (1999). Retired regulars who are entitled to pay, as well as retired reservists who receive hospitalization from an armed force remain subject to court-martial jurisdiction under Article 2 of the UCMJ. 10 U.S.C. §§ 802(a)(4)-(5) (1994); *see McCarty v. McCarty*, 453 U.S. 210, 222 (1981).

For many years, military retirees were eligible for and typically received medical care from the separate system of facilities operated by the armed services, such as the National Naval Medical Center or Walter Reed Army Medical Center. This care can also be provided at DVA facilities. 10 U.S.C. § 1074(b) (1994). Under recent policy changes, military medical facilities have increasingly been limited to treating active duty personnel, much to the consternation of military retirees and career active duty personnel who had expected lifetime care from the military itself (as opposed to DVA). *See generally Sebastain v. United States*, 185 F.3d 1368 (Fed. Cir. 1999), *cert. denied*, 120 S. Ct. 1669 (2000). This shift is directly pertinent to the case at bar because it means that retirees will increasingly be forced to resort to DVA for medical attention. The class of which Stevenson is a member

is therefore not only already sizable, but will continue to expand.

There is no need to elaborate on the corrosive effects of the decision below beyond observing that it is difficult to imagine a course of conduct better calculated to erode the confidence of military retirees in the disinterestedness and candor of DVA personnel on whom they must increasingly rely for care. Beyond this, to the extent that it involves the commandeering of a public health care system for a non-health-related seizure, there is no ambiguity as to purpose, as was arguably the case in *Ferguson v. City of Charleston*, No. 99-936. Rather, the case involves an admittedly non-probable-cause, unconsented search for core law enforcement purposes, as in *City of Indianapolis v. Edmond*, 121 S. Ct. 447 (2000). Indeed, it is an a fortiori case to both *City of Indianapolis* and *City of Charleston* because it does not arise from an established, generic program, but rather, so far as the record shows, was entirely *ad hoc* and suspect-specific. Core Fourth Amendment principles are therefore clearly implicated.

b. The petition explains (at 10-12) that the armed forces lack a vital interest that would even arguably support the seizure of a retiree's blood under Mil. R. Evid. 312(f) in the absence of probable cause. In our view, in applying that rule—or, more fundamentally, in determining whether a reasonable expectation of privacy is implicated or whether a particular search and seizure is unreasonable—a distinction must be drawn between those who are on active duty and those who, like Stevenson and other retirees, are subject to the UCMJ in only an attenuated or technical sense.[3] While

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[3] Analogous issues arise in other contexts under the UCMJ. For example, would language that was disrespectful of the President and therefore clearly punishable under Article 88, 10 U.S.C. § 888 (1994), if uttered by an officer on active duty also be punishable if uttered by a

Rule 312(f) cannot, of course, trump the Fourth Amendment, we assume the Court will explore whether the case can be disposed of through analysis of the rule rather than by reference to the Constitution. *See Ashwander v. TVA*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring). In doing so, the Court should be mindful that the Military Rules of Evidence are not the product of anything resembling the kind of broad-based rule making process it is familiar with in connection with the rules of procedure and evidence that are developed through the Judicial Conference of the United States. *See generally* Kevin J. Barry, *Modernizing the Manual for Courts-Martial Rule-Making Process: A Work in Progress*, 165 MIL. L. REV. 237 (2000).

c. Certiorari is ordinarily disfavored with respect to interlocutory decisions in criminal cases, but that policy is not inflexible. *E.g., Solorio v. United States*, 483 U.S. 435 (1987).[4] Because of the importance of the Question Presented from the standpoint of Fourth Amendment doctrine and the public policy implications noted above, as well as the unusual characteristics of the military criminal appellate process, a departure from the Court's ordinary approach is warranted.

The statutory framework for this Court's review of courts-martial is unlike that applicable to either state or civilian federal convictions. All federal criminal cases are appealable as of right to the courts of appeals, 28 U.S.C. §§ 1291-92 (1994), and in state cases, certiorari runs to "the

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retired officer? *See* 1 Francis A. Gilligan & Fredric I. Lederer, *Court-Martial Procedure* § 2-22.30, at 64-65 & n.163 (2d ed. 1999).

[4] This case lies outside the Solicitor General's policy stated in the last sentence in Robert L. Stern, Eugene Gressman, Stephen M. Shapiro & Kenneth S. Geller, *Supreme Court Practice* 196 n.60 (7th ed. 1993), because the initial and second-stage appeals of the order granting Stevenson's motion to suppress were initiated by the government, not Stevenson. The Solicitor General has waived opposition in this case.

highest court of a State in which a decision could be had." 28 U.S.C. § 1257 (1994). Most military convictions, in contrast, are not subject to direct review in any court, *see generally* Eugene R. Fidell, *Military Rights of Appeal*, 8 DIST. LAW. No. 6, at 42 (July-Aug. 1984), and, more importantly, Congress made no provision for direct review by this Court of cases that either do not meet the sentencing threshold for review in the military judicial system or in which the Court of Appeals denies discretionary review. *See generally* Bennett Boskey & Eugene Gressman, *The Supreme Court's New Certiorari Jurisdiction Over Military Appeals*, 102 F.R.D. 329, 336 (1984).

The extraordinary constraints on appellate review of courts-martial in general and the absence of provision for certiorari to reach cases insulated from or refused review by the higher military courts make it urgent that this Court take a "hard look," as it did in *Solorio*, before concluding that the policy against certiorari in interlocutory criminal appeals should be invoked. Because the case may never return to the Court of Appeals and, even if it does, that court can deny review, there can be no assurance that Stevenson will ever be able to have the important issue present addressed here on direct review. *Cf. Garrison v. Hudson*, 468 U.S. 1301 (Burger, Circuit Justice 1984) (granting stay).[5]

Finally, the Court need have no concern that granting review in this case will open floodgates. Interlocutory appeals by the government under Article 62 of the UCMJ, 10 U.S.C. § 862 (1994), represent only a small fraction of the docket in the Court of Appeals.

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[5] Collateral review is unlikely if Stevenson is convicted since the military does not furnish free counsel for that purpose and public defender programs do not extend to military personnel. In any event, collateral review is not a substitute for direct review in an Article III court. *Guam v. Olsen*, 431 U.S. 195, 202 (1977). This Court is the only Article III tribunal with appellate jurisdiction over the Court of Appeals for the Armed Forces.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

DAVID F. ADDLESTONE
NATIONAL VETERANS LEGAL SERVICES PROGRAM
2001 S St., N.W.
Suite 610
Washington, DC 20009
(202) 265-8305

KEVIN J. BARRY
13406 Sand Rock Court
Chantilly, VA 20151
(703) 968-7247

EUGENE R. FIDELL
(Counsel of Record)
FELDESMAN, TUCKER, LEIFER, FIDELL & BANK LLP
2001 L St., N.W., 2d Floor
Washington, DC 20036
(202) 466-8960

Attorneys for National Institute of Military Justice and National Veterans Legal Services Program

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No. 00-919

In the Supreme Court of the United States

WALTER S. STEVENSON,
United States Army, Petitioner,

v.

THE UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF OF THE UNITED STATES ARMY DEFENSE APPELLATE DIVISION AS AMICI CURIAE IN SUPPORT OF PETITIONER

JONATHAN F. POTTER
Major, U.S. Army Judge Advocate General's Corps
U.S. Army Legal Services Agency
Defense Appellate Division
901 N. Stuart Street
Arlington, VA 22203
(703) 588-5286
Counsel of Record

KEVIN J. MIKOLASHEK
Captain, U.S. Army Judge Advocate General's Corps

DAVID A. MAYFIELD
Lieutenant Colonel, U.S. Army Judge Advocate General's Corps

ADELE H. ODEGARD
Colonel, U.S. Army Judge Advocate General's Corps

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In the Supreme Court of the United States

No. 00-____

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BRIEF OF THE UNITED STATES ARMY DEFENSE APPELLATE DIVISION AS AMICI CURIAE IN SUPPORT OF PETITIONER

The United States Army Defense Appellate Division respectfully submits this brief as *amici curiae* in support of the petitioner.

INTEREST OF THE AMICI CURIAE

The U.S. Army Defense Appellate Division represents individual soldiers who have been convicted by court-martial and who have been adjudged either a punitive discharge or confinement for one year or more. Defense Appellate Division counsel represent these individuals at the Army Court of Criminal Appeals (ACCA), the Court of Appeals for the Armed Forces (USCAAF), and the Supreme Court of the United States.

SUMMARY OF ARGUMENT

The lower court found that the extraction of the second vial of blood from petitioner was indeed a search, but failed to analyze whether any special needs or circumstances existed to justify such a warrantless search in the absence of probable cause. While ignoring this Court's precedent, the lower court effectively removed any governmental restraints related to bodily physical examinations of servicemembers and military retirees. Furthermore, the lower court's decision encourages physical examinations purported to be for purposes of medical care in cases where probable cause does not exist, and encourages military medical personnel to act as law enforcement investigative tools.

ARGUMENT

Stevenson's petition correctly identifies the legal errors in the opinion of the Court of Appeals for the Armed Forces. The United States Army Defense Appellate Division submits this brief to explain the dramatic implications of the lower court's decision, and how that decision effectively removes any Fourth Amendment protection from active duty servicemembers and military retirees seeking medical attention.

This Court has fashioned a framework for analyzing Fourth Amendment cases. The lower court failed to engage in any Fourth Amendment analysis, but, in upholding the intrusion and extraction of a vial of blood, relied instead on the mere fact that the Navy had jurisdication over Stevenson. The Fourth Amendment demands more.

Fourth Amendment jurisprudence requires that the lower court weigh the intrusion of Stevenson's Fourth Amendment interests against the government's interest in conducting a non-probable cause seizure of Stevenson's blood. A search

must be reasonable, and "whether a particular search meets the reasonableness standard" is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Vernonia School District 47J v. Acton*, 515 U.S. 646, 652-653 (1995) (citing *Skinner v. Railway Labor Executive Association*, 489 U.S. 602, 619 (1989)). When a search is conducted by law enforcement officials for the purposes of a criminal investigation, a warrant is necessary absent "special needs" that make a warrant impracticable. *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987).

No "special needs" exist in Stevenson's case, especially given his status on the temporary disabled retired list (TDRL). Those on the TDRL are subject to physical examinations every eighteen months to ensure that they still suffer from a disability, but they are only forced to return to active duty if the disability ceases to exist and the retiree acquiesces to the return to active duty. Members of the TDRL are not necessary components for executing a military mission. Accordingly, the necessity to take actions to preserve the health of TDRL members is not the same as for active duty servicemembers, who must be in physical condition to engage in combat and other arduous duties. In fact, those on the TDRL have been determined to be unable to meet the physical demands necessary of a servicemember, thus their status on the TDRL.

Because military exigencies do not exist for those on the TDRL, Mil. R. Evid. 312(f) cannot be shown to be a needed exception to generally applicable Fourth Amendment protections. Even if the initial intrusion in Stevenson's case was permissible, the subsequent extraction of an additional vial of blood violated Stevenson's Fourth Amendment rights.

Military Rule of Evidence 312(f) is an exception to the Fourth Amendment. Accordingly, it must be appropriately limited to those areas where there are "special needs, beyond the normal need for law enforcement" *Vernonia School Dist.*

47J v. Acton, 515 U.S. 646, 653 (1995)(citing *Griffin v. Wisconsin*, 483 U.S. 868). *See also Treasury Employees v. Von Raab*, 489 U.S. 656 (1989) (drug tests for United States Custom Service employees seeking transfer or promotion to certain positions); *Skinnner v. Railway Labor Executives Assn.*, 489 U.S. 602 (1989) (drug and alcohol tests for railway employees involved in train accidents or found to be in violation of particular safety regulations), or are conducted for certain administrative purposes without particularized suspicion of misconduct if the searches are appropriately limited. *See, e.g., New York v. Burger*, 482 U.S. 691 (1987) (warrantless administrative inspection of premises of a "closely regulated" business); *Michigan v. Tyler*, 436 U.S. 499 (1978) (administrative inspection of fire damaged premises to determine cause of blaze); *Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523 (1967) (administrative inspection to ensure compliance with city housing code).

In Stevenson's case, the subsequent extraction of an additional vial of blood was not for a "special need," nor was it appropriately limited to an extraction of a vial of blood necessary for his medical care. It was a blatant demand by law enforcement officials, who did not have probable cause to seize Stevenson's blood, that medical officials conduct just such a seizure. No connection exists between the medical diabetes screening and the second vial extracted from appellant.

Military Rule of Evidence 313(b) allows non-probable cause extractions of body fluids to ensure "fitness for duty." These medical inspections "are intended to discover, correct, and deter conditions detrimental to military efficiency and safety." *Id.* However, such inspections become searches subject to Fourth Amendment limitations when the investigator's primary motive is criminal prosecution.

United States v. Campbell, 41 M.J. 177, 181 (C.M.A. 1994) (suspicion of criminal activity invalid basis to conduct a urinalysis pursuant to Mil. R. Evid. 313(b)). The criminal evidence and resulting prosecution must be merely "incidental punitive action ancillary to an otherwise justifiable inspection." *United States v. Gardner*, 41 M.J. 189, 192 (C.M.A. 1994). Absent such a justifiable inspection, military courts, before Stevenson's case, required that the criminal investigators show probable cause. *United States v. Patterson*, 39 M.J. 678, 682 (N.M.C.M.R. 1993) (citing *United States v. Ellis*, 24 M.J. 370 (C.M.A. 1987)).

Like the prohibition against subterfuge searches for inspections, Military Rule of Evidence 312(f) prohibits doctors from conducting criminal searches and seizures without probable cause. In *United States v. Nand*, 17 M.J. 936 (A.F.C.M.R. 1984), the Air Force Court of Military Review addressed the admissibility of a urine sample seized during an occupational physical examination. Even though hospital staff used one portion of the urine for the physical and another part for drug testing, the court upheld the search and seizure of urine under Military Rule of Evidence 312(f). *Id.* at 937. It permitted these intrusions because "there [was] no evidence that the commander's order that the sample be given [for a physical] was in any manner a subterfuge to acquire evidence for prosecution." *Id.* The Court of Military Appeals reiterated *Nand's* holding in *United States v. Maxwell*, 38 M.J. 148 (C.M.A. 1993). In *Maxwell*, the use of blood-alcohol evidence was permissible because doctors extracted the patient's blood solely out of concern for his health. *Id.* at 149-50 (citing *United States v. Miller*, 15 C.M.A. 320, 321, 35 C.M.R. 292, 293 (1965)(in a pre-Mil. R. Evid. 312(f) case, blood-alcohol tests are admissible, "if there is no 'nexus' between the doctor and enforcement agents or accused's superiors who may be interested in those results for the purpose of possible prosecution.")(citations omitted)).

CONCLUSION

For the physician's extraction of the second vial of blood to be valid, Mil. R. Evid. 312(f) requires a sufficient nexus between the valid medical purpose and the extraction of blood. No nexus exists between the extraction of the second vial of blood and Stevenson's medical needs. The first vial was all that was necessary to treat Stevenson. The second vial was purely for criminal investigatory purposes. Accordingly, the second vial was a product of an illegal seizure and must be suppressed. The Court should therefore grant the Petition for Certiorari.

Respectfully Submitted,

JONATHAN F. POTTER
Major, U.S. Army Judge
Advocate General's Corps
United States Army
Defense Appellate Division
901 N. Stuart Street
Arlington, VA 22203
(703) 588-5286
Counsel of Record

KEVIN J. MIKOLASHEK
Captain, U.S. Army Judge
Advocate General's Corps

DAVID A. MAYFIELD
Lieutenant Colonel, U.S.
Army Judge Advocate
General's Corps

ADELE H. ODEGARD
Colonel, U.S. Army Judge
Advocate General's Corps

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No. 00-919

In the Supreme Court of the United States

WALTER S. STEVENSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES IN OPPOSITION

BARBARA D. UNDERWOOD
Acting Solicitor General
Counsel of Record

JOHN C. KEENEY
Acting Assistant Attorney General

JOHN F. DE PUE
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

MARC W. FISHER, JR.
Col., USMC

ROBERT M. FUHRER
Maj., USMC
Appellate Government Division
Navy-Marine Corps Appellate Review Activity
Washington, D.C. 20374-5047

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QUESTION PRESENTED

Whether the military judge properly suppressed blood evidence taken during a physical examination from a servicemember on the temporary disabled retired list.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces (Pet. App. 1a-9a) is reported at 53 M.J. 257. The opinion of the Navy-Marine Corps Court of Criminal Appeals (Pet. App. 10a-22a) is reported at 52 M.J. 504. The order of the military judge (Pet. App. 23a-33a) is unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on August 2, 2000. A motion for reconsideration was denied on August 31, 2000 (Pet. App. 34a). The petition for a writ of certiorari was filed on November 29, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(2).

STATEMENT

Petitioner was charged with rape, in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. 920 (1994 & Supp V 1999). Before trial, the military judge granted a motion to suppress evidence. The United States Navy-Marine Corps Court of Criminal Appeals affirmed (Pet. App. 10a-22a). The United States Court of Appeals for the Armed Forces, however, reversed and remanded the case for an evidentiary hearing. *Id.* at 1a-9a.

As summarized in the findings of the military judge (Pet. App. 23a-26a), on November 23, 1992, the wife of a member of the United States Navy was allegedly raped at her on-base residence in Hawaii. During a subsequent medical examination of the victim, blood and semen samples were recovered from her body. In August 1993, the investigation of the rape was closed as unresolved by the Naval Criminal Investigative Service (NCIS).

At the time of the alleged rape, petitioner was serving in the United States Navy and stationed in Hawaii. On July 15, 1994, he was released from active duty and transferred to the Navy's Temporary Disability Retirement List (TDRL) because of a medical disability. Servicemembers are placed on the TDRL when their disability "may be of a permanent nature," but the circumstances do not permit a final determination that the condition is, in fact, "permanent . . . and stable." Pet. App. 4a (quoting 10 U.S.C. 1202). While on the TDRL, a servicemember receives retired pay. He is required to submit to periodic physical examinations, however, "to determine whether there has been a change in the disability for which he was temporarily retired." *Ibid.* (quoting 10 U.S.C. 1210(a)).

Failure of the servicemember to submit to such a periodic examination may lead to termination of retired pay. *Ibid.* When a physical examination leads to a determination that the member is "physically fit" to perform his or her duties, the military service can exercise a number of options, including returning the member to active duty with his consent. *Ibid.*

In November 1997, after reviewing police reports that implicated petitioner as a suspect in a "Peeping Tom" incident that occurred in the vicinity of the rape, NCIS reopened its investigation. Pet. App. 23a. Thereafter, the NCIS office in Hawaii asked NCIS Special Agent John McNutt, assigned to the NCIS office in Memphis, Tennessee, to interrogate petitioner, who was living in Memphis, and to ask him to provide NCIS with a sample of his blood. *Id.* at 24a.

After learning that petitioner was receiving medical treatment at the Veteran's Administration (VA) Hospital in Memphis, McNutt contacted the VA and was allowed to review petitioner's medical records. Pet. App. 24a. During that review, McNutt learned that petitioner was being treated for diabetes and a mental disorder. *Ibid.* Concerned for his safety and that of petitioner, McNutt decided that it was premature to contact petitioner about the investigation. *Ibid.* Instead, McNutt obtained petitioner's blood type from the VA and conveyed the information to NCIS headquarters. Comparison of petitioner's blood type to the information obtained from the blood and semen samples obtained during the victim's medical examination did not eliminate petitioner as a suspect in the rape. *Ibid.*

McNutt was asked to obtain a specimen of petitioner's blood. McNutt, who was aware that petitioner's treatment at the VA Hospital included drawing blood to monitor his diabetes, requested the assistance

of the Regional Counsel for the VA. Pet. App. 24a. McNutt informed him that petitioner was a suspect in a rape investigation and asked if NCIS could obtain a specimen of petitioner's blood whenever he might present himself at the VA Hospital in the normal course of his treatment. *Id.* at 25a. Regional counsel indicated that the VA could comply with NCIS's request and asked for a memorandum formalizing the request. *Ibid.* NCIS provided a memorandum asking that it be notified the next time that petitioner came to the VA hospital to have blood drawn. *Ibid.*

On June 3, 1998, petitioner appeared at the VA Hospital for a regularly scheduled medical visit and consented to having blood drawn for the purpose of medical treatment. Pet. App. 14a. A member of the medical staff inserted a vacuum needle into petitioner's arm, then affixed a tube to the needle and drew blood for medical purposes. The medical technician then removed the first tube and, within five or six seconds, affixed a second tube to the needle for the sole purpose of obtaining the blood specimen requested by NCIS. *Id.* at 25a. After the second specimen had been obtained, the technician removed the vacuum needle from petitioner's arm. *Ibid.* NCIS seized the second tube of blood and transmitted it to the United States Criminal Investigative Laboratory for deoxyribonucleic acid (DNA) comparison with forensic evidence obtained from the victim. *Id.* at 26a. On August 4, 1998, the laboratory reported that the DNA profiles developed from the November 1992 forensic evidence were attributable to the victim, petitioner, and one unknown individual. *Id.* at 14a n.4.

During a pretrial hearing, petitioner moved to suppress his blood and the DNA evidence obtained from him during the medical procedure. Pet. App. 23a. The

military judge granted the motion. *Id.* at 33a. In particular, he found that the blood and DNA evidence were the product of an unlawful seizure because they were not obtained under a search authorization or for a medical purpose, and because VA hospital staff obtained petitioner's consent to having his blood drawn by misrepresenting their purpose for obtaining the blood. *Id.* at 32a-33a. The military judge also rejected the government's contention that the blood evidence was the product of a lawful search authorized under Military Rule of Evidence 312(f). That rule provides that "[n]othing in th[e] rule [governing evidence obtained from body views and intrusions] shall be deemed to interfere with the lawful authority of the armed forces to take whatever action may be necessary to preserve the health of a servicemember," and it exempts from exclusion during a court-martial, "[e]vidence or contraband obtained from an examination or intrusion conducted for a valid medical purpose." Mil. R. Evid. 312(f). The military judge reasoned that the rule "is inapplicable to retired servicemembers on the TDR list, at least to the extent that the medical examination or intrusion was conducted for purposes other than ascertaining the status of a member's medical condition vis-à-vis return to an active duty status." Pet. App. 32a. Finally, the military judge held that the search effected by drawing the second tube of blood violated the defendant's due process rights as it was obtained without petitioner's informed consent and by misrepresentation as to the purpose for which the blood was to be used. *Id.* at 32a-33a.

The U.S. Navy-Marine Corps Court of Criminal Appeals affirmed. Pet. App. 10a. It held that, although the plain language of Mil. R. Evid. 312(f) "does not limit its applicability to active duty servicemembers," Pet.

App. 20a, there is no basis for applying the Rule "to members of the TDRL [as] a needed exception to the Fourth Amendment protections applicable to the general populace based upon military exigencies." *Id.* at 21a. The court explained that the armed forces do not rely on servicemembers on the TDRL to carry out military missions and therefore do not need to be able to take actions necessary to preserve their health as they would for active duty servicemembers. *Ibid.* "[I]n view of the inapplicability of Mil. R. Evid. 312(f)" to petitioner, the court found, "the search and seizure conducted in this case was unreasonable." *Ibid.*

After the Navy-Marine Corps Court of Criminal Appeals denied the government's motion for rehearing, the Judge Advocate General of the Navy (TJAG) certified to the Court of Appeals for the Armed Forces under Article 67(a)(2), UCMJ, 10 U.S.C. 867(a)(2),[1] the questions whether Mil. R. Evid. 312(f) applies to members of the TDRL and whether, if it does, petitioner's blood sample was admissible under that Rule. Pet. App. 2a. The court of appeals reversed, holding that Mil. R. Evid. 312(f) applies to all persons subject to court-martial proceedings regardless of the servicemember's status. Noting that the TDRL is a "'tempo-

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[1] Art. 67, UCMJ, 10 U.S.C. 867, provides in part:

> Review by the Court of Appeals for the Armed Forces
>
> (a) The Court of Appeals for the Armed Forces shall review the record in—
>
> * * * * *
>
> (2) all cases reviewed by a Court of Criminal Appeals which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces for review * * *.

rary' assignment, not a permanent separation from active duty" (Pet. App. 6a), it reasoned that "[t]he constitutional considerations that support the exercise of court-martial jurisdiction over a military member on the TDRL—the receipt of military pay and continuing military status—are no less significant when it comes to the use of evidence obtained during a valid medical procedure concerning the member's continued fitness for military duty." *Id.* at 7a. Accordingly, it concluded that "evidence obtained in compliance with Mil. R. Evid. 312(f) may be used in a court-martial of a person on the TDRL." *Id.* at 8a.

The court of appeals did not decide the question whether the blood sample taken for evidentiary purposes during petitioner's medical examination was admissible under Mil. R. Evid. 312(f). Instead, it remanded the question to the military judge for a determination whether prolonging the intrusion of the needle in petitioner's arm in order to draw the second tube of blood was a *de minimis* intrusion permissible under Mil. R. Evid. 312(f) and the Fourth Amendment. Pet. App. 8a-9a (citing *United States* v. *Fitten*, 42 M.J. 179 (C.M.A.) (upholding taking of second bottle of urine for investigation purposes when first bottle of urine and catheterization was for medical purpose), cert. denied, 516 U.S. 917 (1995)).

ARGUMENT

1. Petitioner does not dispute that bodily intrusions of active members of the armed forces, authorized by Mil. R. Evid. 312(f) "for valid medical purposes," are reasonable searches and seizures under the Fourth Amendment. Rather, petitioner contends (Pet. 7-15) that Mil. R. Evid. 312(f) does not, in view of his TDRL status, justify admitting the evidence obtained when

the military drew and analyzed his blood, and that the evidence was gathered in violation of the Fourth Amendment and should have been suppressed. As petitioner acknowledges, however, "the lower court chose not to analyze [his] case under a Fourth Amendment framework" (Pet. 8), but instead focused upon the narrower issue—unique to military jurisprudence—whether Mil. R. Evid. 312(f) applies to servicemembers on the TDRL. Because the lower court did not reach the Fourth Amendment question posed by petitioner, the Court should decline to review petitioner's claim. See, *e.g.*, *Brandon* v. *Holt*, 469 U.S. 464, 473 n. 25 (1985) (declining to review claim "[b]ecause the Court of Appeals did not address this argument").

2. Moreover, petitioner's Fourth Amendment claim is not ripe for review by this Court. The court below remanded this case to the military judge for a factual determination whether, during petitioner's physical examination, drawing the second tube of blood for law enforcement purposes constituted more than a *de minimis* intrusion. Pet. App. 8a-9a. If, following an evidentiary hearing, the military judge rules in petitioner's favor, the DNA evidence resulting from the blood drawing likely will be suppressed, thereby granting him precisely the relief he now seeks. If, on the other hand, the evidence is admitted, petitioner may still be acquitted on the merits, thereby mooting his claim. And, even if petitioner is convicted, and his conviction is affirmed on appeal, he may then be able to present his contention to this Court in a petition for a writ of certiorari seeking review of a final judgement against him.[2] Accordingly, review by this Court of the

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[2] We note, however, that, under Article 67a, UCMJ, 10 U.S.C. 867a, "[d]ecisions of the United States Court of Appeals for the

Court of Appeals for the Armed Forces' limited decision would be premature.

3. In any event, petitioner's claim that Rule 312(f) cannot constitutionally apply to him in view of his TDRL status is without merit. As petitioner concedes (Pet. 7), to the extent that the Fourth Amendment applies to the armed forces,[3] the courts are in agreement that its application must "take into account the exigencies of military necessity and unique conditions that may exist within the military society." *Murray* v.

Armed Forces are subject to review by the Supreme Court by writ of certiorari * * *. The Supreme Court may not review by writ of certiorari * * * any action by the Court of Appeals for the Armed Forces in refusing to grant a petition for review." Thus, if petitioner is ultimately convicted and his conviction is affirmed by the Navy-Marine Corps Court of Criminal Appeals, but the Court of Appeals for the Armed Forces denies a petition for review, petitioner will be unable to seek further review by this Court.

[3] While the Court has made clear that the Due Process Clause applies in courts-martial, see *Weiss* v. *United States*, 510 U.S. 163, 170 (1994), this Court has never otherwise expressly clarified the extent to which the Bill of Rights, including the Fourth Amendment, applies to the armed forces. See *Davis* v. *United States*, 512 U.S. 452, 457 n.* (1994) (noting that "[w]e have never had occasion to consider whether the Fifth Amendment privilege against self-incrimination, or the attendant right to counsel during custodial interrogation, applies of its own force to the military"). The President has decreed that evidence obtained from an unlawful search or seizure made by a person acting in a governmental capacity is inadmissible against the accused at trials by court-martial, see Mil. R. Evid. 311(a), and the Court of Appeals for the Armed Forces has held that the Fourth Amendment right against unreasonable searches applies to the armed forces, see, *e.g.*, *Murray* v. *Haldeman*, 16 M.J. 74, 81 (C.M.A. 1983) (quoting *United States* v. *Middleton*, 10 M.J. 123, 127 (C.M.A. 1981)). The parties do not contest the point, and it is unnecessary to resolve it now. See *Davis*, 512 U.S. at 457 n.*.

Haldeman, 16 M.J. 74, 81 (C.M.A. 1983) (compulsory drug urinalysis a reasonable seizure within the meaning of the Fourth Amendment); see also *National Treasury Employees Union* v. *Von Raab*, 489 U.S. 656, 671 (1989) (recognizing that members of the armed forces may reasonably "expect intrusive inquiries into their physical fitness"); *Committee for GI Rights* v. *Callaway*, 518 F.2d 466, 477 (D.C. Cir. 1975) (concluding that warrantless drug urinalysis inspections of armed forces personnel serving in Europe are reasonable and constitutional under the circumstances).

Petitioner does not assert that bodily intrusions authorized by Mil. R. Evid. 312(f) are unreasonable searches and seizures under the Fourth Amendment, or that evidence obtained in the course of such a procedure for an active duty servicemember should be suppressed. Indeed, in *Von Raab*, 489 U.S. at 672, the Court held that *civilian* employees of the federal government who are involved in law enforcement activities and are required to carry firearms in the line of duty have a "diminished expectation of privacy" in respect to bodily intrusions for the purpose of determining whether they are using illicit drugs that may adversely affect their "fitness and probity." See also *Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. 602, 627-634 (1989) (holding that, because certain railway employees have diminished expectations of privacy by virtue of participation in an industry dependent on health and fitness of employees, involuntary drug and alcohol testing, following certain train accidents, are reasonable intrusions).

Instead, petitioner's principal argument (Pet. 10-13) is that such reasoning is inapplicable to servicemembers on the TDRL because they are not readily subject to active duty service and therefore their fit-

ness for duty has no bearing upon the military's mission.[4] In concluding that Mil. R. Evid. 312(f) applies to servicemembers on the TDRL, the court of appeals properly rejected this argument.

As the court explained (Pet. App. 6a-7a), Congress has expressly denominated status on the TDRL as involving "temporary disability." 10 U.S.C. 1210(a). Accordingly, Section 1210(a) requires servicemembers on the list to report for periodic physical examinations. The explicit purpose of such examinations is to determine whether the member is "physically fit to perform the duties of his office, grade or rank"—in which case, with his consent, he will be called to active duty as soon as possible (10 U.S.C. 1211(b))—or whether his physical disability is of such a nature that he should be removed and either retired or separated from the service for physical disability. See 10 U.S.C. 1210(c)-(e). Further, even if, following a physical evaluation, a member on the TDRL is determined to be unfit for duty and is retired for physical disability, the member retains military status and may be recalled to active duty under certain circumstances. See Pet. App. 7a (citing *Akol* v. *United States*, 167 Ct. Cl. 99 (1964)). The monitoring of the physical condition of a servicemember on the TDRL is, therefore, necessary for determining his fitness for possible recall in time of need.

For these reasons, it hardly can be said that a routine physical examination of a member on the TDRL to monitor a medical condition, such as diabetes, serves no plausible military health care objective, and that under

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[4] Petitioner incorrectly asserts that the ruling of the Court of Appeals for the Armed Forces affects the rights of all retired military personnel. The court made clear that the ruling applies only to individuals on the TDRL. See Pet. App. 6a.

this Court's precedents such examinations are "symbolic" measures rather than reasonable warrantless intrusions based upon particularized governmental needs. See Pet. 12-13 (quoting *Chandler* v. *Miller*, 520 U.S. 305, 322 (1997) (rejecting on Fourth Amendment grounds the requirement that candidates for public office submit to drug urinalysis)). Thus, as the court below properly concluded, the considerations that permit the armed forces to conduct medical evaluations of servicemembers and authorize the results of any incidental bodily intrusion to be used for evidentiary purposes under Mil. R. Evid. 312(f) apply as well to a servicemember on the TDRL.

4. Finally, petitioner maintains (Pet. 13-14) that, even if the military has a particularized need for conducting physical examinations of servicemembers on the TDRL, that interest does not justify the incremental invasion of his privacy occasioned by the DNA analysis upon a blood sample drawn during the course of his examination.[5] The court below, however, remanded the case for the military judge to determine whether the process of drawing the second tube of blood, subsequently used for DNA analysis, was itself an impermissible intrusion upon interests protected by the Fourth Amendment. The court of appeals, there-

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[5] Petitioner also suggests (Pet. 13) that, in releasing information concerning his DNA to law enforcement authorities for the purpose of prosecution without express judicial authorization, DOD personnel violated internal regulations. See Pet. 13 (citing DOD Directive 5154.24 (Dec. 28, 1996)). Such a violation would not be an independent basis for suppression of evidence. In *United States* v. *Caceres*, 440 U.S. 741, 755 (1979), this Court expressly "declin[ed] to adopt any rigid rule requiring federal courts to exclude any evidence obtained as a result of a violation of [internal agency] rules."

fore, did not address the question whether the ensuing analysis exceeded the scope of a lawful intrusion. Consequently, it would be premature for this Court to address the claim now. See, *e.g.*, *Brandon*, 469 U.S. at 473 n.25 (declining to review claim not addressed by court below).[6]

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[6] The petition in this case need not be held pending the decision in *Ferguson* v. *City of Charleston*, No. 99-936 (argued Oct. 4, 2000). In *Ferguson*, the issue is whether a program of testing the urine of pregnant women for cocaine, developed and implemented by hospital officials in collaboration with law enforcement officials, was justified under the "special needs" exception to the warrant and probable cause requirements of the Fourth Amendment. While the analysis in *Ferguson* could conceivably be relevant to the question whether the taking of the blood sample and DNA analysis conducted for law enforcement in this case complied with the Fourth Amendment, the decision of the court of appeals did not conclusively resolve that issue, but instead remanded it for further evaluation. See Pet. App. 8a-9a. Although the court of appeals focused on "whether the prolonged intrusion of the needle in [petitioner's] arm while a second vial was placed on the vacuum needle, and then for some additional period while the blood was extracted into the vial, was a *de minimis* intrusion," *id.* at 8a, and not on whether the DNA testing was an additional intrusion, the analysis of that issue on remand can take account of any light that may be shed on the issue by *Ferguson*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

BARBARA D. UNDERWOOD
Acting Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

JOHN F. DE PUE
Attorney

MARC W. FISHER, JR.
Col., USMC

ROBERT M. FUHRER
Maj., USMC
Appellate Government Division
Navy-Marine Corps Appellate Review Activity

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IN THE

Supreme Court of the United States

WALTER S. STEVENSON,
United States Navy (Retired),
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Armed Forces

REPLY BRIEF FOR THE PETITIONER

M. ERIC EVERSOLE
Lieutenant, JAGC
U.S. Naval Reserve

OMAR R. LOPEZ
Lieutenant, JAGC
U.S. Naval Reserve

CURT M. ALLEN*
Captain
U.S. Marine Corps
* *Counsel of Record*

U.S. Navy-Marine Corps
Appellate Defense Division
716 Sicard Street, S.E., Suite 1000
Washington Navy Yard, D.C. 20374
(202) 433-4161

Counsel for Petitioner

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In The
SUPREME COURT OF THE UNITED STATES

No. 00-919

WALTER S. STEVENSON,
United States Navy (Retired),
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Armed Forces

REPLY BRIEF FOR THE PETITIONER

The decision of the Court of Appeals for the Armed Forces squarely conflicts with this Court's case law prohibiting non-probable cause intrusions solely to aid criminal investigations. Respondent does not contest the existence of this conflict. Nor does it challenge the important issues raised by the petition. Rather, it attempts to divert this Court by arguing that the claim was not addressed below and is not ripe for review. Respondent also creates, without citing a case, a "plausible objective" test for examining the military's need to conduct non-probable cause searches and seizures. These misguided arguments must not dissuade this Court from granting review.

1. Respondent incorrectly asserts (Br. in Opp. 8, 12-13) that the court of appeals did not address petitioner's claim by misconstruing his argument and the court's opinion. As an initial matter, petitioner does not allege that the court of

appeals ignored his privacy rights by failing to address them. He asserts the court employed an erroneous standard to determine whether NCIS violated his Fourth Amendment rights by conducting a non-probable cause search and seizure of his blood for DNA evidence. The jurisdictional contacts used by the court, as the petition explains (at 9-13), are not sufficient military needs to permit such an intrusion. Thus, the court addressed his Fourth Amendment claim, but did so under an erroneous standard.

Respondent similarly misconstrues the court of appeals' decision to conclude that the court did not address petitioner's claim. The court found that intrusions under Mil. R. Evid. 312(f) raised two Fourth Amendment issues. The first issue was whether NCIS could conduct a non-probable cause search and seizure of petitioner's blood for "valid medical purposes." Pet. App. 6a-8a. The court answered affirmatively, holding that "if some of the blood in the first vial was made available to the NCIS for its investigative purposes, any evidence relating thereto would be admissible."[1] Pet. App. 8a. The second issue concerned the means in which the evidence was seized—that is, whether "the prolonged intrusion of the needle in appellee's [petitioner's] arm while a second vial was placed on the vacuum needle . . . was a *de minimis* intrusion." *Id.* That issue was remanded to the trial court.[2]

The remand of the second issue, contrary to respondent's brief (Br. in Opp. 8), does not affect the court of appeals' consideration of the first issue, which is the basis of the petition. That issue was squarely answered and rejected when

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[1] This conclusion, as stated in the opening brief (at 9, 13), ignores and necessarily rejects this Court's holdings that an examination of body fluid is a second intrusion. *See Arizona v. Hicks*, 480 U.S. 321, 324-25 (1987); *see also Minnesota v. Dickerson*, 508 U.S. 366, 378 (1993) (pat-down search strictly limited to the exigency that give rise to the search).

[2] As will be discussed *infra* in section 2, this second issue is illusory and does not provide petitioner any possible relief. It does not affect the ripeness of petitioner's claim.

the court held that Mil. R. Evid. 312(f) allowed NCIS to search and seize petitioner's blood for DNA evidence. Pet. App. 8a. The second issue concerning the needle intrusion is unrelated to and does not impact the first question.

Moreover, the court of appeals necessarily addressed petitioner's claim by rejecting the Navy-Marine Corps Court of Criminal Appeals's decision. That court held that while Mil. R. Evid. 312(f) applies to members of the temporary disabled retired list [TDRL] (Pet. App. 20a), the rule's application to the facts of this case violated the Fourth Amendment because the military lacked a special need or exigency to conduct such an intrusion. Pet. App. 21a. If the court of appeals merely found the Military Rules of Evidence to be applicable, a finding with which the Navy-Marine Corps court agreed (Pet. App. 20a), then it had no basis to reverse the Navy-Marine Corps court's decision. Respondent's contrary argument cannot impact this Court's decision to grant review.

2. Respondent also attempts to dissuade this Court from granting review by challenging the ripeness of petitioner's case. Respondent does not, and cannot, question this Court's authority to review a non-final judgment of the military court of appeals under 28 U.S.C. § 1259. Rather, it alleges (Br. in Opp. 8-9) that review would be premature because the court of appeals remanded this case for a factual determination and, even if petitioner is convicted, he can seek review at that time. These allegations are misguided.

First, notwithstanding the remand, petitioner's case is ripe because the remanded issue cannot be decided in his favor. *See, e.g.*, *Mills v. Alabama*, 384 U.S. 214 (1966) (a state court's interlocutory decision is final when there are no contested issues on remand). The remanded issue—whether the prolonged needle intrusion had a *de minimis* impact[3]—

[3] Respondent wrongly asserts (Br. in Opp. 8) that the court of appeals remanded this case for a determination of whether there was a Fourth

merely focuses on whether the means used to draw blood is an unreasonable intrusion. This issue has long been decided against petitioner. *See United States v. Fitten*, 42 M.J. 179, 181 (C.M.A. 1995) (citing *Schmerber v. California*, 384 U.S. 757, 771-72 (the taking of blood was a reasonable intrusion)).

Second and more importantly, the jurisdictional statute for this Court's review of military cases, 28 U.S.C. § 1259, will likely preclude future review, a fact effectively conceded by respondent. Br. in Opp. 8 n.2. As the petition noted (at 16-17), this Court can only review military cases in which the court of appeals grants discretionary review. This event is not likely because petitioner's current claim has already been granted and rejected by the court. The court also refused to reconsider its decision, making review even less likely. Pet. App. 34a. Indeed, the only unaddressed Fourth Amendment issue left for petitioner, as discussed *supra*, involves an issue decided by this Court thirty-some years ago. This potential loss of a claim alone makes this case ripe and compels this Court's grant of review. *See Solorio v. United States*, 483 U.S. 435 (1987) (this Court granted review of a military case in the same procedural posture as this case).

3. Finally, respondent's argument with regards to the merits misses the mark. As explained in the petition (at 9-10), non-probable cause searches and seizures are permitted only in extraordinary cases. *See Chandler v. Miller*, 520 U.S. 305, 313-14 (1997); *see also City of Indianapolis v. Edmond*, 531 U.S. ___, ___, 121 S.Ct. 447, 451 (2000). Such intrusions satisfy constitutional scrutiny only when the government has a substantial need to conduct the search and seizure, beyond ordinary law enforcement, and that need outweighs the

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Amendment violation based on the taking of the second sample for "law enforcement purposes." The court remanded only to examine "in light of *Fitten*—whether the prolonged intrusion of the needle in appellee's arm" violated the Fourth Amendment. Pet. App. 8a. The law enforcement aspect of the intrusion plays no part in the remand.

individual's privacy interests. Pet. 10.

Respondent does not challenge the applicability of this standard here. Nor does it contest that the Fourth Amendment applies to petitioner. Br. in Opp. 9 n.4. Instead, it concludes, without citing a single case, that NCIS's search and seizure of petitioner's blood for DNA evidence is permissible because diabetes check-ups serve a "plausible military health care objective." Br. in Opp. 12. The test, however, is not whether the military has a "plausible objective." It is whether the military has a substantial need to conduct the intrusion. As discussed in the petition, no such need is present in this case.

Moreover, respondent's analysis overlooks the necessity of showing that the individual subject to the non-probable cause intrusion plays a direct role in the interest being safeguarded by the intrusion. *See National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 672 (1989) (search and seizure caused by urinalysis program only permissible for employees "who are directly involved in the interdiction of illegal drugs or who are required to carry firearms in the line of duty."). Such a direct role to the military's mission cannot exist when a retiree or member of the TDRL "may be recalled to active duty."[4] Br. in Opp. 11. Respondent also fails to explain how a search for DNA relates to any health care objective.[5] *See Arizona v. Hicks*, 480 U.S. 321, 324-25 (1987); *see also*

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[4] Although respondent criticizes petitioner's statement that the court of appeals' decision "affects the rights of all retired military personnel" (Br. in Opp. 11), its criticism is unjustified. If the court of appeals can suspend the Fourth Amendment rights of TDRL members based on the minimum contacts of jurisdiction, then it can take the same action against retirees, who also are amenable to court-martial jurisdiction. *See* Article 2(a)(4), Uniform Code of Military Justice, 10 U.S.C. § 802(a)(4) (1998).

[5] Respondent asserts (Br. in Opp. 12-13) that the court of appeals did not address this issue and it is not ripe for review. These arguments, like those discussed *supra* (at 1-5), lack merit. The court clearly rejected this impermissible nature of the DNA search by holding that NCIS could conduct any search on the blood once it was obtained. Pet. App. 8a.

Minnesota v. Dickerson, 508 U.S. 366, 378 (1993) (pat-down search strictly limited to the exigency that give rise to the search). Ultimately, NCIS search and seizure of petitioner's blood for DNA evidence was a search for criminal evidence without probable cause. It cannot withstand constitutional scrutiny.

CONCLUSION

For the reasons stated above, and those set forth in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

M. ERIC EVERSOLE
Lieutenant, JAGC
U.S. Naval Reserve

OMAR R. LOPEZ
Lieutenant, JAGC
U.S. Naval Reserve

CURT M. ALLEN*
Captain
U.S. Marine Corps
**Counsel of Record*

U.S. Navy-Marine Corps
Appellate Review Activity
716 Sicard Street, S.E., Suite 1000
Washington Navy Yard, DC 20374
(202) 433-4161

Counsel for Petitioner

February 2001